(1) Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

POTOMAC CORPORATION,

Petitioner,

v.

TROY SWINTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a hostile work environment case brought under 42 U.S.C. § 1981, where the basis for imposing employer liability is the failure of plaintiff's supervisor to report or redress co-worker harassment, should the employer be denied an opportunity to raise the affirmative defense to vicarious liability established by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), merely because the plaintiff relies on a negligence theory of liability?

In light of this Court's holdings in *Faragher*, *Ellerth* and *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999) that federal employment discrimination laws are intended "not to provide redress but to avoid harm," must an employer-defendant in a hostile work environment case brought under 42 U.S.C. § 1981 be permitted to present evidence of the employer's post-complaint remediation efforts as a means of mitigating a punitive damages claim?

RULE 29.1 LISTING

Petitioner, Potomac Corporation, has no parent companies or subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Potomac Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 4-39)[1] is reported at 270 F.3d 794. The judgment entered by the District Court is unreported (App., 1).

JURISDICTION

The Court of Appeals entered its judgment on October 24, 2001. A timely filed petition for rehearing was denied on December 5, 2001 (App., 50). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citi-

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[1] All references to pages of the attached Appendix are delineated as "App., __."

zens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT

The essential facts giving rise to Potomac Corporation's petition are all undisputed:

- Respondent, Troy Swinton ("Swinton"), is an African American. He was employed by Potomac Corporation d/b/a U.S. Mat ("U.S. Mat") as a shipping department worker in Woodinville, Washington from August 1996 until he quit in February 1997.

- U.S. Mat distributed an employee manual to all of its employees, including Swinton, which contained an anti-harassment policy, and the following procedure for reporting harassment:

> If you believe you are being harassed by co-workers or others, notify your Supervisor. If you believe you are being harassed by your Supervisor, or if this is otherwise inappropriate, notify the President. No employee will be retaliated against

in any way for making a factually supported claim of harassment.

- Jon Fosdick, a front-line supervisor with no immediate authority over Swinton, regularly told racially offensive jokes in the presence of Swinton and others while visiting the shipping department.

- Swinton's immediate supervisor, Pat Stewart, witnessed Fosdick's racially offensive jokes and comments. Although designated by U.S. Mat as a recipient for harassment complaints, Stewart never reported Fosdick's behavior to anyone in management, and never told Fosdick to stop making racially offensive jokes and comments.

- Swinton never complained about Fosdick's conduct to Stewart, and Swinton never reported Fosdick's behavior to U.S. Mat's President or to any other member of management before he quit.

In July of 1997, Swinton filed a hostile environment claim against U.S. Mat under 42 U.S.C. Section 1981 and R.C.W. 49.60 *et seq.* (the Washington anti-discrimination statute). While the case was pending in the district court, this Court handed down *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998). These cases established that an employer is vicariously liable for a hostile environment "created by a supervisor with immediate (or successively higher) authority over the employee," subject to an affirmative defense comprised of two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The instant case proceeded to trial under theories of both "vicarious" and "negligence" liability. U.S. Mat proposed jury instructions requiring consideration of the *Faragher/Ellerth* affirmative defense under both theories.[2]

The district court gave a vicarious liability instruction advising the jury to find liability, subject to the *Faragher/Ellerth* affirmative defense, if, *inter alia,* it found that "John Fosdick was employed in a supervisory capacity and participated in the harassment." (App., 48 (Instruction No. 12)). The district court also gave a "negligence" liability instruction which, over U.S. Mat's objection, did not contain the *Faragher/Ellerth* affirmative defense. (App., 47 (Instruction 10)).

The jury returned a verdict in favor of Swinton, and awarded $5,612 in back pay and $30,000 for emotional distress. The jury also awarded Swinton punitive damages of $1,000,000 under his §1981 claim. (App., 1).

The Ninth Circuit's Decision Regarding Applicability Of *Faragher/Ellerth* Vicarious Liability Analysis To Plaintiff's Claim

The Ninth Circuit concluded that the district court gave an erroneous vicarious liability instruction because it suggested that U.S. Mat could be held vicariously liable for acts of a supervisor who did not have immediate or successively higher authority over Swinton. (App., 18). The court nevertheless found this error to be "harmless." It reasoned that "even after the advent of the affirmative defense outlined in *Ellerth* and *Faragher,* the negligence standard

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[2] U.S. Mat offered Instruction 17 advising the jury to consider whether U.S. Mat had established the *Faragher/Ellerth* affirmative defense when evaluating plaintiff's "negligence" claim. (App., 2-3).

'still applies to sexual harassment by co-workers,'" and it held that the jury could reasonably have found "negligence" liability because Swinton's supervisor witnessed, but failed to report the harassment. (App., 13; 17). In so holding, it rejected U.S. Mat's argument, supported by Eleventh and Fourth Circuit authority, that the *Ellerth/Faragher* affirmative defense should be available where liability is premised on a supervisor's failure to report harassment, even if that liability is based on negligence. The holding also deepened an already existing split among the circuits with respect to this issue.

The Ninth Circuit's Decision Regarding Admissibility Of Employer's Post-Occurrence Efforts To Prevent Recurrence Of Workplace Harassment

Separately, the district court blocked repeated attempts by U.S. Mat to introduce evidence that two months after Swinton filed his lawsuit, all of U.S. Mat's supervisors and managers were sent to training sessions designed to prevent recurrence of harassment.

The Ninth Circuit acknowledged that this [Supreme] Court has never "faced head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim." (App., 31). The Ninth Circuit nevertheless concluded that the decision to admit evidence of an employer's post-occurrence remediation efforts in a hostile environment employment case should be left to the trial court's discretion, subject to "traditional relevance principles," (App., 35), and found no abuse of discretion in the district court's exclusion of the fact that all U.S. Mat supervisors and managers underwent anti-harassment training approximately two months after plaintiff filed suit. (App., 38).

REASONS FOR GRANTING THE PETITION

In *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998), this Court established an affirmative defense to vicarious liability in cases where a supervisor with immediate (or successively) higher authority over the plaintiff creates an actionable hostile environment, but takes no tangible employment action. The circuit courts are split as to whether the *Faragher/Ellerth* vicarious liability and affirmative defense analysis must apply (in lieu of a negligence analysis), where liability springs from a supervisor's failure to report or redress co-worker harassment. This Court should grant certiorari to resolve this disagreement among the circuit courts, and to clarify the scope of its holdings in *Faragher* and *Ellerth*.

In addition, this Court should grant certiorari to ensure that the integrity of its holdings in *Faragher, Ellerth* and *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 545, 119 S. Ct. 2118, 2129 (1999) is not compromised by the Ninth Circuit's holding that, in the context of a hostile environment case, evidence of employer efforts to prevent recurrence of workplace harassment is not necessarily admissible.

I. THE CIRCUIT COURTS ARE SPLIT AS TO WHETHER THE *FARAGHER/ELLERTH* VICARIOUS LIABILITY AND AFFIRMATIVE DEFENSE ANALYSIS MUST APPLY WHERE A SUPERVISOR FAILS TO REPORT OR REDRESS CO-WORKER HARASSMENT

A. The Eleventh And Fourth Circuits Apply The *Faragher/Ellerth* Vicarious Liability And Affirmative Defense Analysis Where The Basis For Liability Is A Supervisor's Failure To Report Or Redress Co-Worker Harassment

In *Coates v. Sundor Brands, Inc.,* 160 F.3d 688 (11th Cir. 1998), the Court of Appeals for the Eleventh Circuit ana-

lyzed an employer's liability for co-worker harassment where the plaintiff alleged that management knew of the co-worker harassment but nevertheless failed to take reasonable steps to correct it. Although the plaintiff had sought to impose "negligence" liability for a manager's failure to report or redress co-worker harassment, the Eleventh Circuit determined, as a "threshold matter," that the case was "controlled" by *Faragher* and *Ellerth*. The Eleventh Circuit gave no consideration to any "negligence" theory thereafter. The court explained the basis for this determination as follows:

> The rationale on which the Supreme Court based its holding in *Faragher* and *Burlington Industries*—"the aided-by-the-agency-relation principle," *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2290; *see also Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2269—applies just as readily in cases where supervisors fail to act to abate sexual harassment by co-workers as where supervisors themselves are directly responsible for the harassment. It is because supervisors are agents of the employer with the authority to handle complaints of sexual harassment that they are approached by employees who are victims of such harassment by co-workers. And it is this same status as agents, and the authority that comes with it, that can prolong or aggravate the sexual harassment when those supervisors fail to act on such complaints . . . . Thus the employee suffers two distinct harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury.

Coates, 160 F.3d at 693. The Eleventh Circuit went on to apply the *Faragher/Ellerth* affirmative defense to the facts before it, and determined that the employer was not liable.

The Court of Appeals for the Fourth Circuit, in an unpublished opinion, likewise determined that the "vicarious" liability and affirmative defense analysis set forth in *Faragher* and *Ellerth* should apply to a co-worker harassment case in which the plaintiff alleged that she complained of harassment to her immediate supervisor, but the supervisor never took adequate measures to correct the situation. In *Ocheltree v. Scollon Productions, Inc.*, 1998 WL 482783 (4th Cir. 1998), the Fourth Circuit reasoned that in *Ellerth* and *Faragher*, "the Supreme Court disregarded the actual or constructive knowledge element [of a negligence claim] and held that '[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.'" *Ocheltree*, 1998 WL 482783, **3. Because one of the plaintiff's supervisors "was at least in part responsible for creating the [hostile] work environment" by being unresponsive to plaintiff's complaints, the Fourth Circuit concluded that the proper method of analysis was vicarious liability under *Faragher* and *Ellerth*. Like the Eleventh Circuit, the Fourth Circuit in *Ocheltree* gave no consideration to an alternative "negligence" liability theory under these facts.

B. The Ninth Circuit, On The Other Hand, Held That The *Faragher/Ellerth* Analysis Is Optional, And Would Apply A "Negligence" Analysis (Without Affirmative Defense) Where A Supervisor Fails To Report Or Redress Co-Worker Harassment

As was the case in *Coates* and *Ocheltree*, plaintiff's immediate supervisor here failed to report or redress co-worker harassment. Faced with these facts, the Ninth Circuit held that the *Faragher / Ellerth* vicarious liability and affirmative defense analysis was merely one of two possible analytical options:

> A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence. Which route leads to employer liability depends on the identity of the actual harasser, specifically whether he is a supervisor of the employee, or merely a co-worker. If the harasser is a supervisor, the employer may be vicariously liable. *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 875 (9th Cir. 2001); *Ellison v. Brady*, 942 F.2d 872, 876 (9th Cir. 1991). If, however, the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent, *i.e.*, that the employer knew or should have known of the harassment but did not take adequate steps to address it. *Nichols*, 256 F.3d at 875. Even after the advent of the affirmative defense outlined in *Ellerth* and *Faragher*, the negligence standard 'still applies to sexual harassment by coworkers.' *Burrell v. Star Nursery*, 170 F.3d 951, 955 (9th Cir. 1999).

(App., 13).

The Ninth Circuit went on to reject explicitly any need to apply the *Faragher/Ellerth* affirmative defense under a negligence theory (App., 14-15), even though Stewart's misuse of supervisory authority was the basis for so-called "negligence" liability in this case:

> It is beyond dispute that Stewart fell into the second category of "management" employees identified by Lamb: employees with "an official or strong de facto duty to act as a conduit to management for complaints about work conditions." 956 F. Supp. at 1517. The duty here was official and explicit, not left to chance. By the very terms of U.S. Mat's employee manual, Stewart was charged with accepting reports of harassment; he was the one to whom

> Swinton was to report first if he experienced harassment. And it is also undisputed that Stewart personally witnessed the harassment; he admitted as much. It could even be said that he participated in it himself by laughing along with Fosdick's jokes. Under these circumstances, we are confident in concluding that Swinton presented overwhelming and undisputed evidence justifying a verdict in his favor under a negligence theory, as outlined in Instruction 10.

(App., 17).

There is thus no doubt that the facts here are such that the Fourth and Eleventh Circuits would have concluded that Stewart had been "at least in part responsible for creating" a hostile work environment, and those circuits would have permitted the jury to apply the *Faragher/Ellerth* analysis—including the obligation of the employee to report harassment. In the Ninth Circuit, however, the affirmative defense is not available.

C. Six Other Circuits Apply A "Negligence" Analysis (Without The Affirmative Defense) Where A Supervisor Fails To Report Or Redress Co-Worker Harassment

The Eleventh, Fourth and Ninth Circuits are the only Circuits to have addressed directly the question of whether the *Faragher/Ellerth* vicarious liability and affirmative defense analysis should apply to cases where a supervisor fails to report or redress co-worker harassment. This understates the level of disagreement among the circuits, however, as the Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have continued to apply a pure negligence analysis in such cases even after *Faragher* and *Ellerth*. *See,*

Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2d Cir. 1998 (applying negligence analysis where co-worker harassment was reported to and witnessed by supervisor but not reported up the ladder); *Williamson v. City of Houston,* 148 F.3d 462 (5th Cir. 1998) (applying negligence analysis where co-worker harassment was reported to and witnessed by unresponsive supervisor, and rejecting argument that employer should not be any more accountable for "knowledge" where supervisor receives report and does nothing than it is when supervisor harasses plaintiff directly); *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933 (6th Cir. 2000) (applying negligence analysis where co-worker harassment was reported and observed by allegedly unresponsive supervisor); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (applying negligence analysis where co-worker harassment was reported to allegedly unresponsive supervisor); *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796 (8th Cir. 1998) (applying negligence standard where plaintiff alleged that supervisor was on notice of co-worker harassment); and *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2000) (applying negligence analysis where co-worker harassment was reported to unresponsive supervisor).

All tolled, nine circuits have weighed in, either explicitly or implicitly, on the issue presented in this case. And there is clear disagreement, with seven circuits on one side and two on the other. This split, which effects *every* employer, should be promptly resolved by this Court.

II. THE NINTH CIRCUIT'S REFUSAL TO REQUIRE A JURY INSTRUCTION ON THE *FARAGHER/ELLERTH* AFFIRMATIVE DEFENSE WAS IN CONFLICT WITH THE RATIONALE AND HOLDINGS IN *MERITOR, FARAGHER* AND *ELLERTH*

The Ninth Circuit's held that the jury could properly impose "negligence" liability because "[f]or the purposes of liability and damages, what Stewart knew, Potomac knew, and what Stewart failed to do, Potomac failed to do as well." (App., 41) This approach had the effect of imposing vicarious liability, but left U.S. Mat without the benefit of the *Faragher/Ellerth* affirmative defense. The Ninth Circuit's holding is therefore in conflict with this Court's reasoning and holdings in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399 (1986), *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998).

A. *Faragher* And *Ellerth* Hold There Is No Automatic Liability For A Hostile Environment Created By "Misuse Of Supervisory Authority" Where No Tangible Employment Action Is Taken

In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399 (1986), this Court held that employers are not "always automatically liable for sexual harassment by their supervisors," noting that courts should look to agency principles for guidance in determining employer liability for actionable workplace harassment. *Meritor,* 477 U.S. at 72, 10 S. Ct. at 2408. *Meritor's* holding later became the starting point for this Court's analysis in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998), wherein the rule against strict liability for an actionable hostile environment created by a supervisor was affirmed, provided that no "tangible employment

action" has been taken against the plaintiff. In that circumstance, this Court reached an "accommodation" between "agency principles of vicarious liability caused by misuse of supervisory authority" and "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," which was embodied in the affirmative defense. *Ellerth*, 524 U.S. at 764-65; 118 S. Ct. at 2270. An employer can escape liability altogether if it proves that: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*

B. Whether A Supervisor Was "Aided By The Agency Relation" In Creating Hostile Environment Was The Lynchpin Of This Court's Analysis In *Faragher* and *Ellerth*

Section 219(2)(d) of the Restatement of Agency provided the lynchpin of this Court's analysis in *Faragher* and *Ellerth* insofar as it led to the conclusion that an employer should be "vicariously" liable for any actionable hostile environment created by a supervisor who is "aided by the agency relation" by misusing his supervisory authority. Section 219(2)(d) provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of his employment unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Ellerth, 524 U.S. at 758, 118 S. Ct. at 2267.

This Court reasoned that a supervisor is clearly "aided by the agency relation" if he takes some discriminatory tangible employment action against the plaintiff, and under that circumstance, the employer should always be vicariously liable. *Ellerth*, 524 U.S. at 762-63, 118 S. Ct. at 2269. Where the supervisor does not take any tangible employment action against the plaintiff but nevertheless misuses his supervisory authority to create an actionable hostile environment, however, the employer escapes vicarious liability by proving the two elements of its affirmative defense.

C. A Supervisor Who Creates A Hostile Environment By Harassing Plaintiff Directly, And A Supervisor Who Creates Hostile Environment By Failing To Report Or Redress Co-Worker Harassment Are Both "Aided By The Agency Relation" And The *Faragher/Ellerth* Affirmative Defense Should Apply In Both Cases

The Ninth Circuit's articulation of two alternative "routes" to liability "depending on the identity of the harasser" (App., 13) misconstrues this Court's holdings in *Faragher* and *Ellerth*. Because "vicarious" liability exists when an actionable hostile environment is created by a "misuse of supervisory authority," as *Faragher* and *Ellerth* both hold, then whenever the supervisor has a hand in creating the hostile work environment, the *Faragher/Ellerth* affirmative defense should apply.

While this Court did not explicitly address in *Faragher* or *Ellerth* whether the vicarious liability and affirmative defense analysis should apply in cases where a supervisor fails to report or redress co-worker harassment, it is nevertheless clear that there is no reason to differentiate between a supervisor who harasses a subordinate directly, and a supervisor who does not harass but who fails to

report or redress a co-worker's harassment of the subordinate. In either case, the supervisor is "aided by the agency relation" because he "misuses" his authority to "create a hostile environment." As the Eleventh Circuit said in *Coates*, when supervisors fail to redress or report co-worker harassment, "it is this same status as agents, and the authority that comes with it, that can prolong or aggravate" the harassment. And the employee thus "suffers two distinct harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury." *Coates*, 160 F.3d at 693.

It makes little sense to endow an employer defendant with an affirmative defense when the basis of liability is a supervisor's direct harassment, but deny the same employer that right when the basis for liability is the supervisor's failure to redress or report harassment from a co-worker.

III. THIS COURT'S DICTA IN *FARAGHER* AND *ELLERTH* GIVES RISE TO A DISAGREEMENT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD OF LIABILITY TO BE APPLIED IN CO-WORKER HARASSMENT CASES

The split among the courts of appeals regarding the appropriate theory of liability in co-worker harassment cases may spring from confusion about whether *Faragher* and *Ellerth* should be read to render the long line of co-worker "negligence" cases obsolete. *Faragher*, 524 U.S. at 800; 118 S. Ct. at 2289.

Specifically, in the context of examining the usefulness of the "scope of employment" analysis as a basis for imposing vicarious liability on employers for supervisor harassment, this Court recognized a broad "unanimity of views among the holdings of District Courts and Courts of Appeals thus far." *Id.* It noted:

> Those courts have held not only that the sort of harassment at issue here was outside the scope of supervisors' authority, but, by uniformly judging employer liability for co-worker harassment under a negligence standard, they have also implicitly treated such harassment as outside the scope of common employees' duties as well.

Id. It is the statement immediately following this one that appears, at first glance, to evidence this Court's desire to preserve the "negligence" analysis in co-worker harassment cases:

> It is quite unlikely that these cases ***would escape efforts to render them obsolete*** if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their employment.

Id. (Emphasis added).

This dicta breathes life into the proposition, implemented by seven circuits so far, that a "negligence" standard should still apply in co-worker harassment cases. That proposition finds further support in the supposed distinction, drawn by this Court in *Ellerth*, between "negligence" and "vicarious" liability:

> [A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. . . . Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Ellerth, 524 U.S. at 759; 118 S. Ct. at 2267.

In fact, as evidenced by this Court's own analysis under Section 219(2) of the Restatement of Agency, *either* negligence *or* "aided by the agency relation" form a basis for imposing vicarious, *i.e.*, "respondeat superior" liability on an employer for acts of an employee that are outside the scope of employment. *See,* Restatement (2d) of Agency, Section 219(2). The differences in stringency of these two standards of *vicarious* liability should, as a practical matter, be meaningless after *Faragher* and *Ellerth*. Instead, a misinterpretation of *Faragher* and *Ellerth* by lower courts has prevented employers from raising the affirmative defense in co-worker harassment cases where the basis for liability is a supervisor's failure to report or redress the co-worker harassment. In consequence, employers can face higher exposure for co-worker harassment than for supervisor harassment. Employers should not have fewer defenses in co-worker cases, when the basis for their liability is more attenuated.

Absent intervention and clarification by this Court, then, the *Faragher/Ellerth* "accommodation" between principles of "vicarious liability" and Title VII's "equally basic policies of encouraging forethought by employers and saving action by objecting employees," will be eroded beyond recognition in co-worker harassment cases. That is demonstrated most plainly by the instant case. Despite the employer's creation of an anti-harassment policy and complaint reporting mechanism, and despite the fact that the plaintiff did not report the harassment, the plaintiff nevertheless succeeded in imposing "negligence" liability because plaintiff's supervisor failed to report or redress the harassment. This cannot be the result the Court intended. As this Court explained in *Faragher*: "[i]f the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could

have avoided." *Faragher,* 524 U.S. at 807, 118 S. Ct. at 2292.

IV. THE NINTH CIRCUIT'S RULE LEAVING ADMISSIBILITY OF AN EMPLOYER'S POST-OCCURRENCE REMEDIATION EFFORTS TO THE TRIAL COURT'S DISCRETION UNDERMINES THE COURT'S HOLDINGS IN *FARAGHER, ELLERTH* AND *KOLSTAD*

The Ninth Circuit noted in its opinion that this [Supreme] Court has never "faced head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim." (App., 31). After reviewing the admissibility of such evidence in several non-employment cases, the Ninth Circuit concluded that the decision to admit evidence of an employer's post-occurrence remediation efforts in a harassment case should be left to the trial court's discretion, based on so-called "relevance" considerations. (App., 35-36).

This Court should grant *certiorari* to clarify that evidence of post-occurrence remediation efforts is *always* relevant and admissible, because any other rule ignores the fact—recognized repeatedly by this Court—that the "primary objective" of Title VII is "a prophylactic one," and that Title VII's "chief" aim is "not to provide redress but to avoid harm." *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 545, 119 S. Ct. 2118, 2129 (1999) (recognizing Title VII "as an effort to promote prevention as well as remediation"). *See also, Faragher,* 524 U.S. at 807, 118 S. Ct. at 2292; and *Ellerth,* 524 U.S. at 764, 118 S. Ct. at 2270.

As the Ninth Circuit itself pointed out, evidence of an employer's post-occurrence remediation efforts are "part and parcel of the legal framework" in a discriminatory harassment case:

> Under the negligence standard, the plaintiff must prove that the employer failed to take reasonably prompt corrective action once it learns of the harassment. And, in the vicarious liability context, the ***Ellerth/Faragher*** defense encourages employers to introduce such evidence as a defense to liability.

(App., p. 35).

It is therefore inconceivable that an employer's efforts to prevent harassment from recurring, even if undertaken after the plaintiff's lawsuit is filed, could ever be "irrelevant" and therefore inadmissible. By leaving the admissibility of an employer's post-occurrence remediation efforts to chance under a discretionary "relevance" standard, however, the Ninth Circuit "undid" much of the "good" (*i.e.*, creating a legal framework that rewards employers for taking adequate preventive and remedial actions) done by this Court in *Faragher, Ellerth* and *Kolstad.*

CONCLUSION

For the reasons stated above, Potomac Corporation respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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App. 1

[Filed August 19, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUDGMENT IN A CIVIL CASE

TROY SWINTON,

Plaintiff,

v. Case Number C97-1399CT

POTOMAC CORP., d/b/a CRESCENT CARDBOARD CO., d/b/a CRESCENT/ U.S. MAT,

Defendant.

__XX__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff is awared $ 5,612.00 Back pay
$ 30,000.00 Emotional Distress
$1,000,000.00 Punitive damages

8/19/99 BRUCE RIFKIN
Clerk

by, /s/
Deputy Clerk

DEFENDANT'S INSTRUCTION NO. 17

Affirmative Defense

If you find that Plaintiff has established that an objectively and subjectively hostile work environment existed, and if you find that Plaintiff has established that U.S. Mat management knew or should have known of the hostile work environment, U.S. Mat can avoid liability and damages altogether if it establishes, by a preponderance of the evidence, both of the following propositions:

1) that U.S. Mat exercised reasonable care to prevent and correct promptly any harassing behavior, and

2) that Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by U.S. Mat or to avoid harm otherwise.

Relevant considerations in evaluating whether U.S. Mat can establish the first element of this affirmative defense include whether U.S. Mat maintained and distributed a policy prohibiting racial harassment and retaliation for making complaints of harassment, and whether such a policy had a reporting mechanism in place which did not require Plaintiff to report his complaint to the alleged harasser.

Relevant considerations in evaluating whether U.S. Mat can establish the second element of this affirmative defense include whether Plaintiff failed to take advantage of his employer's harassment policy by using the complaint procedure provided by the policy, and whether Plaintiff

failed to give his employer an opportunity to implement corrective measures to address the complained-of harassment.

Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Montero v. Agco Corp.*, 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998); *Coates v. Sundor Brands, Inc.*, 1998 U.S. App. LEXIS 28457 (11th Cir. 1998); *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998).

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY SWINTON,
Plaintiff-Appellee,

v.

POTOMAC CORPORATION, dba Crescent Cardboard Company, dba Crescent/U.S. Mat,
Defendant-Appellant.

No. 99-36147

D.C. No. CV-97-01399-JET

OPINION

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted January 9, 2001
Submission Withdrawn
Resubmitted October 24, 2001—Seattle, Washington

Filed October 24, 2001

Before: M. Margaret McKeown, William A. Fletcher, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge McKeown [15019]

COUNSEL

Thomas Sullivan (argued), Jenner & Block, Chicago, Illinois,

Sarah E. Pace (on the brief), McBride Baker & Coles, Chicago, Illinois, for the defendant/appellant.

Jeffrey Needle, Law Office of Jeffrey Needle, Seattle, Washington, for the plaintiff/appellee.

OPINION

McKEOWN, Circuit Judge:

This case should serve as a reminder to employers of their obligation to keep their workplaces free of discriminatory harassment. Although much of what happened here was characterized as "jokes," neither the discrimination nor the jury verdict is a laughing matter. Troy Swinton, a worker in the shipping department of a cardboard company, was subject to repeated "jokes" by co-workers featuring use of the word "nigger" and to a continuing stream of racial slurs. He sued his former employer for racial harassment under federal and state anti-discrimination statutes, and a jury awarded him $5,612 in back pay, $30,000 for emotional distress, and [15023] $1,000,000 in punitive damages. The employer's claims on appeal fall into three categories. First, the employer asserts that the district court's failure to instruct the jury as to an affirmative defense under *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), as applied to a negligence theory of employer liability, warrants a new trial. Second, it alleges a variety of evidentiary and instructional errors. Finally, the employer argues that punitive damages were either unwarranted as a matter of law, or, in the alternative, constitutionally excessive under *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). We affirm

both the liability determination and the award of punitive damages.

BACKGROUND

Troy Swinton was employed in the shipping department of U.S. Mat between August 1996 and February 1997. He was the only African-American of approximately 140 employees of the Woodinville, Washington company, which manufactures cardboard matting used in picture frames. Shortly before Swinton was hired, the company was acquired by the Chicago-based Potomac Corporation.

Swinton became aware of U.S. Mat through his fiancée, whose uncle, Jon Fosdick, worked there as supervisor in the bevel-cutting department. Swinton listed Fosdick as a reference on his job application. Fosdick would often stop by the shipping department. While there, he would regularly tell racially offensive jokes in the presence of Swinton and others. Among the "jokes":

> - What do you call a transparent man in a ditch? A nigger with the shit kicked out of him.
>
> - Why don't black people like aspirin? Because they're white, and they work. [15024]
>
> - Did you ever see a black man on "The Jetsons"? Isn't it beautiful what the future looks like?
>
> - Reference to "Pontiac" as an acronym for "Poor old nigger thinks it's a Cadillac."

According to Swinton, Fosdick began telling such jokes soon after he arrived at the company and continued "whenever he felt like it, all the time."

Pat Stewart, Swinton's immediate superior as supervisor of the shipping department, witnessed Fosdick telling racial

jokes and laughed along. Swinton testified that Stewart "was present at the table most of the time when [Fosdick] was coming in and saying this [the racial jokes]." Stewart also acknowledged making "racial jokes or a slur" two or three times, though it is not clear from his testimony whether such conduct occurred in Swinton's presence. Stewart also overheard one of the two plant managers make racial jokes on several occasions. Stewart admitted that although he had an obligation under company policy to report the racial harassment, he never made any such report and never told Fosdick or anybody else to stop making such jokes.

Though Fosdick was the main perpetrator of the jokes, Swinton's co-workers also told racially offensive jokes in his presence, and those comments were witnessed by several co-workers. The jokes and comments ranged from numerous references to Swinton as a "Zulu Warrior" to a comment in the food line, "They don't sell watermelons on that truck, you know, how about a 40-ouncer?" On the subject of Swinton's broken-down car, it was suggested "why don't you get behind it and push it and call it black power" and "why don't you just jack a car. You're all good at that."

Testimony by co-workers underscored the ubiquity of the racist atmosphere at U.S. Mat. One co-worker said that there were jokes about a wide variety of ethnic groups, including [15025] whites, Asians, Polish people, gays, Jews, and Hispanics. Another testified that the majority of the people at U.S. Mat had actually witnessed the use of racially offensive language, and a third employee testified that "just about everybody" at U.S. Mat had heard Fosdick use "racial slurs and comments."[1] During the short time he

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[1] The trial transcript contains references to many other instances of offensive racial comments by various employees of U.S. Mat, but

(continued...)

was at U.S. Mat, Swinton heard the term "nigger" more than fifty times.

Swinton's reactions to the racially derogatory comments included glaring and walking away, and remarking to co-workers that the jokes were "f***ed up." Swinton testified that he did not directly ask Fosdick to stop because he knew that Fosdick regularly carried a .22 caliber pistol in his back pocket.

Despite Fosdick's regular use of racially offensive language, Swinton and Fosdick socialized both at work and outside of work. Swinton claimed that he socialized with Fosdick not because he enjoyed doing so, but only at the urging of his fiancée (Fosdick's niece), to maintain harmonious family relations.

Swinton testified that he did not immediately quit in the face of the racial comments because he needed the job to support himself and his fiancée, who was pregnant. He eventually quit on February 27, 1997, stating in his testimony that he was "fed up . . . with all the name-calling. I was angry. I was mad. I was upset. I was frustrated. I just couldn't take it no more. I had to get out of there." Potomac's theory explaining why Swinton quit and brought suit centers around an alleged breakdown in family relations. According to Potomac, Swinton brought suit as a means to retaliate against Fosdick because of comments that Fosdick's wife purportedly made about Swinton and his fiancée. [15026]

Upon commencing employment at U.S. Mat, Swinton was presented with an employee manual. Swinton testified alternately that he "read" and "browsed through" the manual;

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[1] (...continued)
it is not clear whether any of these were directed at, or witnessed by, Swinton.

he did sign a form acknowledging that he received it. The employee manual included the following language:

> If you believe you are being harassed by co-workers or others, notify your Supervisor. If you believe you are being harassed by your Supervisor, or if this is otherwise inappropriate, notify the President. No employee will be retaliated against in any way for making a factually supported claim of harassment.

Swinton never availed himself of any formal internal complaint procedures. He advanced several reasons. According to Swinton, the "Supervisor" to whom he was supposed to direct his complaint was Pat Stewart, who had already witnessed the joke-telling and had actually "laugh[ed] along." Swinton claimed that he did not know the identity of the "President" (whom the manual identified as an alternative complaint recipient), and thus did not bring the harassment to his attention. Swinton also feared Fosdick, whom he knew to carry a gun. Swinton told a co-worker that he feared that he might lose his job if he complained because he was the "low man on the totem pole" (questioner's paraphrase). Finally, Swinton testified that "everyone already knew." This answer came in response to a question whether "people in management" knew of the racially offensive language directed at him.

On March 7, 1997, Swinton filed an application for unemployment benefits with the Washington Employment Security Department, indicating that he had quit on February 28. In his handwritten responses to questions on the application form, Swinton referred to "racial slander" and "racial jokes daily by numerous people," and stated, "Everyday, from one person or another, a racial joke or comment was thrown my way, and I was sick and tired of it." Swinton identified several of the specific jokes about which he and others later testified at trial. [15027] He noted that he "didn't feel comfortable going to management

because they knew about the problem [and] did nothing about it."

The State of Washington notified U.S. Mat of Swinton's allegations of racial harassment on or about April 17, 1999. Upon learning of the charges, U.S. Mat Human Resources Manager Vickie Thompson interviewed Stewart, the plant co-managers, and the president. All denied to Thompson that they had witnessed the harassment of Swinton. Sometime in June, Thompson also interviewed Fosdick, who had left U.S. Mat's employ April 1. After Swinton filed suit in July 1997, Thompson interviewed more of Swinton's co-workers, who confirmed Fosdick's telling of racial jokes but stated that they believed that Swinton was not bothered by them and "would laugh and joke back." In September of 1997, in apparent response to Swinton's charges, U.S. Mat had all of its supervisors and managers undergo training for the identification and prevention of harassment. No one at U.S. Mat was disciplined for the use of, or toleration of, offensive racial language. Swinton filed suit against Potomac in Washington state court, alleging causes of action under 42 U.S.C. § 1981,[2] R.C.W. 49.60 *et seq.* (the "Washington Law Against Discrimination"), and the state tort of "outrage" (intentional infliction of emotional distress). Potomac removed the action to federal court. Judge John Coughenour, who conducted pre-trial proceedings, denied Potomac's motion for summary judgment on the causes of action under the job discrimination statutes, but granted its motion as to the state "outrage" claim. The case was then transferred to Judge Jack Tanner for trial. After trial, [15028] the jury returned a verdict for Swinton and

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[2] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . . The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

damages consisting of $5,612 in back pay, $30,000 for emotional distress, and $1,000,000 in punitive damages. Potomac moved for a new trial under Federal Rules of Civil Procedure 50(b) and 59. The district court denied the motion with a brief order stating that the motion "merely rehashes arguments that it made and lost during trial."

STANDARDS OF REVIEW

"[T]he verdict must be affirmed if there is substantial evidence to support the verdict." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). The evidence must be viewed in the light most favorable to the non-moving party (Swinton). *See Omega Envtl., Inc. v. Gilbarco. Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997). In evaluating jury instructions, "prejudicial error results when, 'looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered.'" *In re Asbestos Cases*, 847 F.2d 523, 524 (9th Cir. 1988) citing *Pollock v. Koehring Co.*, 540 F.2d 425, 426 (9th Cir. 1976). "This court reviews evidentiary rulings for abuse of discretion." *United States v. Fleming*, 215 F.3d 930, 938 (9th Cir. 2000) (citation omitted). We review de novo a due process challenge to the punitive damages award. *Cooper Industries, Inc. v. Leatherman*, 121 S.Ct. 1678, 1683 (2001).

DISCUSSION

I. ELLERTH/FARAGHER DEFENSE

We first address whether the affirmative defense to employer liability established in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), is available in a claim for harassment based on the employer's negligence. In those cases the Supreme Court set out the contours of an em-

ployer's affirmative [15029] defense to harassment perpetrated by a superior, available in certain circumstances. The Court held,

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [ ] harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . . No affirmative defense is available however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher, 524 U.S. at 806; *Ellerth*, 524 U.S. at 765 (citation omitted) (the language in each case is identical). The defense is premised on the principle that an employer may escape liability for harassment by certain of its employees when it undertakes appropriate steps to remedy the situation. The defense also recognizes that a harassed employee bears some responsibility to avoid or mitigate workplace hostility. The question is whether such a defense is available under all of Swinton's claims: 1) vicarious liability; 2) harassment based on negligence (the defendant knew or should have known of the harassment); and 3) the state law claim. Potomac asserts that the district court erred by failing to incorporate the *Ellerth / Faragher* defense into the jury instruction on the negligence theory. But, as we explain, the court was not required to do so. [15030]

A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence.[3] Which route leads to employer liability depends on the identity of the actual harasser, specifically whether he is a supervisor of the employee, or merely a co-worker. If the harasser is a supervisor, the employer may be held vicariously liable. *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 875 (9th Cir. 2001); *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991). If, however, the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent, *i.e.* that the employer knew or should have known of the harassment but did not take adequate steps to address it. *Nichols*, 256 F.3d at 875. Even after the advent of the affirmative defense outlined in *Ellerth* and *Faragher*, the negligence standard "still applies to sexual harassment by coworkers." *Burrell v. Star Nursery*, 170 F.3d 951, 955 (9th Cir. 1999).

Swinton's negligence theory was based primarily upon the harassment by Fosdick, who, while a supervisor within the company, was not *Swinton's* supervisor in the shipping department. The Supreme Court made clear that the affirmative defense outlined in *Ellerth* and *Faragher* applies only in cases of vicarious liability, where the harasser is the victim's supervisor. *Faragher*, 524 U.S. at 807 (stating that

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[3] Though *Ellerth* and *Faragher* involve Title VII, their reasoning applies to cases involving § 1981 and RCW 49.60 *et seq.* *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987) ("An employee may seek relief under both Title VII and section 1981 for racial discrimination in employment. *Lowe [v. City of Monrovia]*, 775 F.2d [998], 1010 [(9th Cir. 1986)] . . . . The same standards apply, and facts sufficient to give rise to a Title VII claim are also sufficient for a section 1981 claim. *Id.*"); *see also Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 875 n.9 (9th Cir. 2001) (similarity of Title VII and WLAD); *Xieng v. People's Nat'l Bank*, 844 P.2d 389, 392 (Wash. 1993) (same).

"[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" and then proceeding to outline affirmative defense). [15031]

Potomac argues that the availability of the *Ellerth / Faragher* defense in the vicarious liability context, but not in the negligence context, "leads to an absurd result: that an employer is better off if the harasser is an immediate supervisor or someone with successively higher authority, because it triggers an obligation of the plaintiff to utilize internal remedies." This reasoning rests on the faulty premise that an employer is "better off" in the strict liability context than in the negligence context.

It is, in fact, slightly misleading to say that the *Ellerth / Faragher* defense is not available in the negligence context. While it is strictly true that it is not available as an affirmative defense, the principle embodied in the defense—that an employer can avoid liability in situations where it acts promptly to remedy harassment—is contained in the requirements for a prima facie case based on negligence. In the context of this case, it was Swinton's burden, in accord with Jury Instruction 10, to prove that management knew or should have known of the harassment and "failed to take reasonably prompt, corrective action . . .". And, as the Second Circuit has explained, a plaintiff alleging co-worker harassment must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (cited in the post-*Ellerth / Faragher* case *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63 (2d Cir. 1998)). This formulation is substantively similar to the *Ellerth / Faragher* defense; the chief difference is that in the negligence context, the plaintiff bears the burden of proving the employer's failure to

respond adequately to the harassment, while, in a vicarious liability regime, the defendant must establish the corrective action as an affirmative defense.

And, indeed, it is not clear under which rubric employers are "better off" from an evidentiary and legal standpoint. It might reasonably be argued, in fact, that employers are "better off" in the negligence context, where the plaintiff is required [15032] to prove both the employer's knowledge of the harassment (or that it should have known) and that it failed to take reasonable corrective action. In the strict liability context, the plaintiff is required to prove significantly less in the prima facie case: merely that the harasser was his supervisor. Thus, given the different elements that the plaintiff must prove under each theory, it is quite logical that the defense should be available in one context but not the other. Under which theory of liability an employer is "better off" is often in the eyes of the beholder, will vary under the specific facts of the case, and has no bearing on whether the employee may assert the *Ellerth / Faragher* defense. The fact is that vicarious liability and negligence are two distinct bases for liability, each with its own elements of proof.

Given the overwhelming evidence of racial harassment presented at trial, it is hardly surprising that the jury would have imposed liability against Potomac under the negligence theory, as articulated by Jury Instruction 10, which provided in relevant part that the jury should find for Swinton if they determined:

> That management knew, through complaints or other circumstances, of the harassing conduct or language by Fosdick or co-workers and the employer failed to take reasonably prompt, corrective action designed to end the harassment, OR
>
> That management should have known of the harassment [by] Fosdick or co-workers, due to the pervasive-

> ness of the conduct or language, or through other circumstances, and the employer failed to take reasonably prompt, corrective action designed to end the harassment.

Indeed, in light of the undisputed testimony detailing Fosdick's racial harassment of Swinton, the racial comments and acquiescence of co-workers, and the undisputed testimony [15033] that Pat Stewart witnessed the harassment but did nothing to end it, the jury was all but compelled to find for Swinton under this instruction.

Potomac, however, maintains on appeal that, though Stewart was a supervisor, he was not part of U.S. Mat's "management," as identified in Jury Instruction 10, and thus that his knowledge and inaction could not be imputed to the company. We considered the issue of what sort of employees constitute "management" for purposes of imputation to the employer in Title VII law in *Brooks v. City of San Mateo*, 229 F.3d 917, 925 n.6 (9th Cir. 2000). The discussion in *Brooks* relied heavily on the district court opinion in *Lamb v. Household Servs.*, 956 F. Supp. 1511, 1516-18 (N.D. Cal. 1997), which featured a thorough survey of the law in this area. The court in *Lamb* identified two categories of employees who qualify as management for these purposes. First, an employee is a member of management if a "supervisor[ ] possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment," such as "authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's employment." *Id.* at 1517. Second, a supervisor who lacks such authority is nonetheless classified as "management" if he "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *Id.*; *see also Distasio*, 157 F.3d at 64 ("An official's knowledge will be imputed to an employer when: '. . . (B) the official is

charged with a duty to act on the knowledge [of harassment] and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment.'") (quoting *Torres v. Pisano*, 116 F.3d 625, 636-37 (2d Cir. 1997) (citations omitted)).

It is beyond dispute that Stewart fell into the second category of "management" employees identified by *Lamb*: employees with "an official or strong de facto duty to act as a conduit to management for complaints about work [15034] conditions." 956 F. Supp. at 1517.[4] The duty here was official and explicit, not left to chance. By the very terms of U.S. Mat's employee manual, Stewart was charged with accepting reports of harassment; he was the one to whom Swinton was to report first if he experienced harassment. And it is also undisputed that Stewart personally witnessed the harassment; he admitted as much. It could even be said that he participated in it himself by laughing along with Fosdick's jokes. Under these circumstances, we are confident in concluding that Swinton presented overwhelming and undisputed evidence justifying a verdict in his favor under a negligence theory, as outlined in Instruction 10.

Potomac maintains, however, that, even if Instruction 10 correctly stated the law, the verdict nonetheless cannot stand because Instruction 12 on the vicarious liability theory was incorrect. This instruction purports to set forth the vicarious liability theory, as well as the *Ellerth/Faragher* defense. It states that the jury may find for the plaintiff if it finds, inter alia, "That John [sic] Fosdick was

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[4] Here we may determine that Stewart was a member of "management" as a matter of law because "[t]he [c]ourt's conclusion depends not on factual findings regarding the job, but on the implications of the employment with[in] the Title VII framework." *Lamb*, 956 F.Supp. at 1516 n.4 (citing *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985)).

employed in a supervisory capacity and participated in the harassment." Potomac is correct that this instruction is an erroneous statement of the law. It is not sufficient that Fosdick "was employed in a supervisory capacity." Rather, for vicarious liability to attach, he must have been Swinton's supervisor. *See Faragher*, 524 U.S. at 806 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by *a supervisor with immediate (or successively higher) authority over the employee*.") (emphasis added).

We employ the following standard in evaluating a verdict where the jury was given an incorrect instruction: [15035]

> An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1337 (9th Cir. 1985). While this standard of review is less stringent than review for harmless error in a criminal case, it is more stringent than review for sufficiency of the evidence, in which we view the evidence in the light most favorable to the prevailing party. *See, e.g., United States v. Adler*, 879 F.2d 491, 495 (9th Cir. 1988). In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.

Caballero v. City of Concord, 956 F.2d 204, 206-07 (9th Cir. 1992). Under the particular facts of this case, we can conclude with confidence that the inclusion of the incorrect vicarious liability instruction was more probably than not harmless. This is not a case where the jury might have found for the defendant under the negligence instruction but instead found for the plaintiff under the erroneous vicarious liability instruction. In such a case, where we

could not determine that the jury did not rely on an incorrect statement of the law, the verdict could not stand. But here, as explained above, given the overwhelming evidence presented at trial, it is much more likely than not that Swinton would have prevailed under the negligence theory, as outlined in Instruction 10, even if the jury had not been given the option of considering vicarious liability at all. Our conclusion is further bolstered by the fact that the jury returned a large punitive damages award, which we have held constitutes evidence that an erroneous jury instruction was harmless. *See Lambert v. Ackerly*, 180 F.3d 997, 1009-1010 (9th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1116 (2000) (citing *Larez v. Holcomb*, 16 F.3d 1513, [15036] 1518 (9th Cir. 1994); *Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1989)).

In sum, we hold that the district court did not err in its formulation of the negligence theory of employee liability for harassment, and that the promulgation of the erroneous vicarious liability instruction was harmless.

II. JURY INSTRUCTION/EVIDENTIARY CHALLENGES

A. Instruction under 42 U.S.C. § 1981

Potomac proposed an instruction under 42 U.S.C. § 1981, stating that the plaintiff was required to prove both intentional discrimination and "that white employees were not subject to" the same sort of conduct as was Swinton. The district court did not err in declining to give such an instruction. Potomac is correct that § 1981 does require proof of intentional discrimination. But there is no authority for the proposition that the word "intentional" must be included in jury instructions. The cases Potomac cites in this regard, *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1981), *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 536 (9th Cir. 1982), and *Williams v.*

Owens-Illinois, Inc., 665 F.2d 918, 927 (9th Cir. 1982), do not state that a jury must specifically be told that they must find "intentional" discrimination. *Evans* simply rejected the district court's view that a § 1981 claim required an allegation of conspiracy. *Gay* held that a disparate impact theory of employment discrimination was insufficient to state a claim under § 1981. Similarly, *Williams* concerned the use of statistical evidence to prove employment discrimination. These cases are not relevant here, where there is no conceivable argument that the harassment perpetrated by Fosdick (and imputed to the employer through the doctrines discussed in Section I., *supra*) was not, in fact, intentional.

The Supreme Court has held that employment discrimination not based on a disparate impact theory is, in fact, intentional [15037] discrimination: "The 1991 [Civil Rights] Act limits compensatory and punitive damages awards . . . to cases of 'intentional discrimination'—that is, cases that do not rely on the 'disparate impact' theory of discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (citation omitted). Swinton did not base his claim on a disparate impact theory. Under our precedent, an employer is liable on a hostile environment claim:

> Where the employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Pavon v. Swift Transp. Co., Inc., 192 F.3d 902, 908 (9th Cir. 1999). The jury instructions adequately included these elements and mirrored the Ninth Circuit model civil jury instruction for disparate treatment under Title VII, which is analogous for purposes of this analysis.

Nor was Swinton required to prove that white employees were not subject to similar harassment. To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks would give new meaning to equal opportunity. Potomac's status as a purported "equal opportunity harasser" provides no escape hatch for liability. The fact that Fosdick may have told jokes about racial or ethnic groups other than African-Americans does not excuse the fact that he racially harassed Swinton. *See, e.g., Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1995) (rejecting claim that harassing language directed at woman was "cured" by fact that harasser also referred to men as "assholes").

B. General instruction regarding corporations

Potomac asserts that the district court committed prejudicial error by giving a standard instruction regarding corporate [15038] liability, Instruction No. 3, which provides in part, "a corporation is responsible for the acts of its employees, agents . . . performed within the scope of authority." Potomac argues that this instruction misstates the law of employer liability as stated in *Ellerth*, *Faragher*, and *Kolstad*.

It is true that this instruction, taken in isolation, does not fully state the applicable law of employer liability for harassment by its employees. But the law governing appellate review of jury instructions counsels against looking at any one jury instruction in isolation. Rather, "prejudicial error results when, *'looking to the instructions as a whole*, the substance of the applicable law was [not] fairly and correctly covered.'" *In re Asbestos Cases*, 847 F.2d 523, 524 (9th Cir. 1988) (emphasis added) (citing *Pollock v. Koehring Co.*, 540 F.2d 425, 426 (9th Cir. 1976)). Taken as a whole, the instructions given by the district court do "fairly and correctly" cover the proper legal standard governing em-

ployer liability. As discussed above, Instruction 10 correctly states the law governing employer liability under the negligence standard, and Instruction 12, addressing vicarious liability, though incorrect as to the identification of the supervisor, correctly included the *Ellerth/Faragher* defense. Therefore, it was not prejudicial error for the district court to give a general, boilerplate instruction regarding corporations, when more specific instructions regarding employer liability in the harassment context were given as well.

C. Admission of summaries of Swinton's statements to counselors

The district court admitted two exhibits consisting of documents prepared by psychologists contacted by Swinton after he left the employ of U.S. Mat. These documents include Swinton's account of the harassment, as related to the therapist. Potomac argued in a motion in limine that these documents consist of hearsay outside any exception, and it repeats this argument on appeal. [15039]

The district court admitted these medical summaries under Federal Rule of Evidence 803(4), which excludes from hearsay, "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The exhibits at issue appear to reflect the psychologists' collection of a patient's medical history, a routine part of medical diagnosis. Potomac has not offered any evidence, case law, or argument to the contrary. The cases it cites do not discuss Rule 803(4), the medical diagnosis exception; rather, they discuss Rule 803(3), the state of mind exception, and Rule 803(6), the business records exception. In sum, nothing suggests that the district court abused its

discretion in admitting the exhibits pursuant to Fed. R. Evid. 803(4).

D. Refusal to admit evidence relating to timing of retention of counsel and seeking of counseling

Potomac unsuccessfully sought to admit evidence that Swinton only sought psychological counseling two days after consulting with his attorney. Potomac's argument is that the court's ruling prevented it from effectively cross-examining Swinton and arguing that his emotional distress claim was not genuine. Although another judge might have chosen to admit this timing evidence, the district court fully considered the issue and was within its discretion in making its ruling. Potomac had ample opportunity to cross-examine Swinton about the extent of his mental distress and to explore the basis for the emotional distress claim. In any event, given the wealth of other evidence admitted, any error on this evidentiary point was almost certainly harmless.

E. Court's questioning of Hondo Vo

Potomac asserts that the district court demonstrated bias by improperly questioning Hondo Vo, one of the two co-plant [15040] managers at U.S. Mat. The law grants district judges wide discretion to participate in the questioning of witnesses. "It is well established that a trial judge is more than a moderator or umpire." *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986). "It is entirely proper for him to participate in the examination of witnesses for the purpose of clarifying the evidence, confirming counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *Id.* The court "overstep[s] the bounds of propriety and deprive[s] the parties of a fair trial," thus

requiring a new trial, "only if the record 'discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality.'" *Id.* (citing *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525 (9th Cir. 1986)).

An examination of the questions the court posed to Hondo Vo reveals little of consequence. Probably the information most harmful to Potomac about which the court inquired of Vo was the fact that Swinton was the only black employee at U.S. Mat.[5] But this colloquy was not the jury's only source of this information. Even before the judge's inquiry, Swinton himself testified to this fact, as did Vickie Thompson, the human resources director. Later, Lloyd Everhard, U.S. Mat's president, testified to the same thing. At the beginning of the trial, out of the presence of the jury, Potomac's counsel actually admitted that it was inevitable that the jury would be made aware of this fact during trial. Therefore, the court's elicitation of this information was, if anything, cumulative and superfluous. It did not present the jury with anything about which it was not already aware, and thus was not prejudicial. [15041]

F. Court's statement about "going all over the countryside"

Potomac asserts error in the district court's statement, during the direct testimony of company president Lloyd Everard, "Can we get to the issues of this case with this witness instead of going all over the countryside?" It was not error for the district court to make this statement. An examination of the context in which the court made this comment reveals that it came after several minutes of

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[5] U.S. Mat's hiring practices were not at issue in the lawsuit.

testimony that were frequently interrupted by objections that the witness' answers were not responsive to the attorney's questions. The court, as was entirely proper, was simply expressing its desire for the witness to answer questions without injecting extraneous information.

G. District court's "exclusion" of exhibit regarding the investigation

The last of Potomac's asserted evidentiary errors concerns what it terms the "exclu[sion]" of an undated memorandum written by human resources director Vickie Thompson purporting to recount the steps she took in her investigation of the Swinton matter. Potomac misperceives what actually took place; this exhibit was never excluded by the court. When Potomac moved during Thompson's testimony for the admission of the document, Swinton's attorney objected on hearsay grounds. The court responded, "I will reserve on it. Let me see it. Go ahead." Swinton's attorney then said that he also objected on the grounds that the exhibit had not been identified in the pretrial order. The court responded, "I understand the argument and the objection. Let's continue with this witness. Something else." The court never "excluded" the exhibit. It merely "reserved" ruling on the objection, to which Potomac's attorney responded by stating, "I have no further questions."

Potomac's attorney could have used the document to refresh the witness's memory on the point. Although he [15042] started down this path before he first moved for admission of the exhibit, he never followed-up. He could have argued that the report was admissible as a past recollection recorded under Federal Rule of Evidence 803(5). He chose not to do so, and we are in no position to second-guess his tactics. Potomac's counsel also could have asked the court for an immediate ruling, but, for whatever reason, chose not to. Nor did Potomac raise the issue again or at a later point

move for introduction of the exhibit. In any case, Potomac cannot now complain of the exclusion of evidence when the district court never actually excluded it. In addition, it is true that this exhibit was not included in the pretrial order. The court would be well within its discretion to exclude an exhibit not identified in the pretrial order. *See* Fed. R. Civ. P. 16(e); *Byrd v. Guess*, 137 F.3d 1126, 1131-32 (9th Cir. 1998); *United States v. Lummi Indian Tribe*, 841 F.2d 341, 320 (9th Cir. 1988).

III. PUNITIVE DAMAGES

A. Availability of punitive damages under Kolstad

In *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), the Supreme Court clarified the standard to be applied in assessing punitive damages in the employment discrimination context. The Court rejected the contention that punitive damages are available only in cases of an employer's "egregious" conduct. *Id.* at 534. But it held that, to be liable for punitive damages, the employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. Most relevant here, the Court held that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" *Id.* at 545 (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)). [15043]

The parties generally agree that the answer to the question whether punitive damages are appropriate under *Kolstad* turns on whether the actions (or, rather, the inaction) of Swinton's direct supervisor, Pat Stewart, in the face of Fosdick's behavior, may properly be imputed to Potomac. Potomac takes the position that Stewart—though

designated in the employee manual as the proper recipient of harassment complaints by virtue of his position as Swinton's supervisor—was only a low-level supervisor and was thus not employed in a "managerial capacity," permitting punitive damages under *Kolstad*, 527 U.S. at 542-43.

Courts in several other circuits have addressed similar situations, where a supervisor who did not actually perpetrate the harassment but nonetheless was responsible under company policy for receiving and acting upon complaints of harassment, failed to take action to remedy the harassment. They have reached the conclusion that the inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment. In *Deters v. Equifax Credit Information Servs., Inc.*, 202 F.3d 1262 (10th Cir. 2000), a plaintiff sexually harassed by co-workers complained to the manager designated to receive such reports, but the manager failed to act. The Tenth Circuit held that the employer could not avail itself of *Kolstad's* "good faith" defense because the very person the company entrusted to act on complaints of harassment failed to do so, and failed with malice or reckless disregard to the plaintiff's federally protected rights. *See id.* at 1271; *see also Cooke v. Stefani Management Servs., Inc.*, 250 F.3d 564, 569 (7th Cir. 2001) (Where the "claim [is] that the supervisor failed adequately to remedy the harassment[,] . . . the supervisor acts on behalf of the company in enforcing (or failing to enforce) its [ ]harassment policy, and it is therefore fair to attribute his knowledge and acts to the company.") (citing *Deters*); *cf. Lamb v. Household Credit Servs.*, 956 F.Supp. 1511, 1516-18 (N.D. Cal. 1997) (classifying supervisor [15044] responsible for passing on complaints of harassment as management for purposes of liability); *Distasio*, 157 F.3d at 64 (same).

In an effort to invoke the good faith defense, Potomac cites to its written materials forbidding harassment and putting in place anti-harassment procedures as conclusive evidence that it acted in good faith and was thus undeserving of punitive damages. Aside from the fact that, as just noted, Potomac is not entitled to assert the good-faith defense under these circumstances, it is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.2d 493, 517 (9th Cir. 2000); *Lowery v. Circuit City Stores*, 206 F.3d 431, 446 (4th Cir. 2000) ("While an employer's institution of a written policy against race discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind with respect to racial minorities, such a policy is not automatically a bar to the imposition of punitive damages.") (citation omitted); *Defenbaugh v. Wal-Mart Stores*, 188 F.3d 278, 286 (5th Cir. 1999) ("Wal-Mart's only evidence [of an anti-discrimination policy] was that it (Wal-Mart) encourages employees to contact higher management with grievances. Plainly, such evidence does not suffice to establish, as a matter of law, Wal-Mart's good faith in requiring its managers to obey Title VII."). Surely, U.S. Mat cannot claim to have *implemented* its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee (Stewart) charged with carrying it out vis-a-vis Swinton laughed along with the "nigger" jokes, did nothing to stop them, and never reported the repeated incidents to higher management. U.S. Mat made a considered judgment to place responsibility for reporting on an employee's direct supervisor. It could well have required some other supervisor or manager further up the chain to be the point of contact. And it could have impressed upon its supervisors, like Stewart, whom it tasked with accepting complaints of harassment, [15045] the (we would hope) obvious point that

repeatedly subjecting a black employee to "nigger" jokes is wholly unacceptable, and at odds with basic anti-discrimination principles. But it chose not to, and U.S. Mat cannot now be heard to protest that Stewart's position was too "low-level" to warrant imputation of his actions or inaction to the company.

B. Post-litigation remedial actions

Potomac next seeks a new trial on punitive damages because the district court excluded evidence of one of the steps taken by U.S. Mat to remedy the discrimination after Swinton filed his discrimination suit. Potomac argues that such evidence is relevant to the issue of punitive damages because it demonstrates the company's good faith once the company became fully aware of the racial harassment; also, such evidence would tend to show that the imposition of punitive damages was not necessary to deter U.S. Mat from future tolerance of harassment. Swinton counters that such evidence was properly excluded as irrelevant.

Swinton cites numerous cases purporting to stand for the proposition that evidence of post-occurrence remediation is nearly always irrelevant in discrimination cases. *See Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1561 n.17 (9th Cir. 1994); *Bouman v. Block*, 940 F.2d 1211, 1227 (9th Cir. 1991); *Gonzales v. Police Dep't, City of San Jose*, 901 F.2d 758, 761 (9th Cir. 1990). These cases, however, do not sweep as broadly as Swinton asserts. Courts have held, quite sensibly, that evidence of post-event occurrences are rarely relevant to the issue of whether the defendant actually engaged in discrimination. This notion was best summarized in *Gonzalez*, 901 F.2d 758 at 762: "Curative measures simply do not tend to prove that a prior violation did not occur."

But the issue of discrimination *vel non* is distinct from the issue whether punitive damages are warranted. *See*

Kolstad, 527 U.S at 534 ("Congress plainly sought to establish two [15046] standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award."). Given the fact of different standards for the imposition of liability and the award of punitive damages, it is not unreasonable to conclude that evidence that may be irrelevant to proving the former is nevertheless relevant to demonstrating the appropriateness of the latter (and vice versa). *See EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 527 (7th Cir. 2001) ("[B]ecause the size of a punitive award reflects the jury's assessment of the defendant's blameworthiness, many circumstances that bear on this issue become relevant, even though they could not defeat liability.") (en banc).

In support of its argument, Potomac points us to several recent decisions of the Supreme Court, and one from this court, in which the opinions, in discussing punitive damages, make reference to remedial action undertaken by defendants after the filing of a lawsuit. For example, in *BMW*, 517 U.S. at 565-66, the Court commented on steps the car maker took to mend its ways, even after the trial court's imposition of the punitive damages award. *See id.* at 579 ("[I]t is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions"); *see also id.* at 579 n.31 ("Before the verdict in this case, BMW had changed its policy [relating to the misconduct that led to liability] . . . . *Five days after the jury award*, BMW altered its nationwide policy.") (emphasis added).

Similarly, in *Cooper Indus., Inc. v. Leatherman Tool Group. Inc.*, 121 S. Ct. 1678 (2001), the Court noted in the punitive damages context remedial actions taken by the defendant after the filing of the lawsuit. *See id.* at 1680-81 ("The first

ToolZall was designed to be virtually identical to [Leatherman's product], but the design was ultimately modified in response to this litigation."); *see also id.* at 1680 ("[After the entry of a preliminary injunction,] Cooper withdrew the original [15047] ToolZall from the market and developed a new model with plastic coated handles that differed from the PST."). Most recently, this court, affirming a grant of summary judgment for the employer in a sexual harassment case, relied on the fact that the employer undertook "extensive" investigation of sexual harassment charges after the plaintiff filed a charge with the Equal Employment Opportunity Commission and conducted mandatory training seminars for all employees several months later. See *Kohler v. Inter-Tel. Techs.*, 244 F.3d 1167, 1181-82 (9th Cir. 2001).

Potomac thus urges the view that, as a general principle, remedial action undertaken by the defendant, even after the filing of a lawsuit, is necessarily admissible and relevant to the issue whether punitive damages are appropriate. We do not, however, read the cases as necessarily establishing the bright-line rule Potomac urges. The Supreme Court's references to post-litigation remedial action are glancing and ambiguous. The Court did not, to be sure, face head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim. We do not interpret the language in *BMW* and *Cooper* as *relying* on evidence of post-occurrence remediation for overturning the punitive damages awards; rather, the Court appears simply to have been recounting a full history of the litigation to give a complete picture of the proceedings. Nonetheless, the Court's passing references are not without some persuasive value in the context of evaluating punitive damages on appeal.

A review of case law from other jurisdictions and academic commentary on this subject reveals no consistent rule on the admissibility of such evidence. *See* Tom Alan Cunningham & Paula K. Hutchinson, *Bifurcated Trials: Creative Uses of the Moriel Decision*, 46 *Baylor L. Rev.* 807, 821-22 (1994) ("Some courts have held that evidence of a defendant's rehabilitated character or actions or both are irrelevant to the issue [15048] of punitive damages, on the theory that it is the defendant's intent, motive or state of mind at the time of the occurrence which is controlling. However, other courts have found that subsequent occurrences may be relevant to the determination of punitive damages, insofar as such damages are intended to serve as a deterrent to future bad acts.") (footnotes omitted). Some courts have taken the view that such evidence is almost never relevant in assessing punitive damages. For example, in *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), the jury awarded the plaintiff $10,000,000 in punitive damages following the death of his wife from toxic shock syndrome caused by the defendant's tampons. The district court, notwithstanding the fact that it found the size of the award within reason and entered judgment for the plaintiff in this amount, nonetheless reduced the punitive damages to $1,350,000 upon a promise by Playtex to "discontinu[e] the sale of some of its products, institut[e] a program of alerting the public to the dangers of toxic shock syndrome, and modify[ ] its product warning." *Id.* at 1440-41.

The Tenth Circuit reversed, however, holding that such remittitur was improper because the district court "based its decision to remit on events occurring after trial." *Id.* at 1449. In doing so, the *O'Gilvie* court relied on decisions from both the Kansas Supreme Court and the Oregon Supreme Court holding that evidence of post-occurrence action by the defendant is not relevant in determining punitive damages. *See Ettus v. Orkin Exterminating Co.*,

665 P.2d 730, 741 (Kan. 1983) (holding that only factors relevant under Kansas law in determining punitive damages are those involving "the quality of the character of the tortious act itself."). Or, as the Oregon Supreme Court explained, such evidence is generally not relevant to an award of punitive damages because it is more likely to be motivated by a desire to mitigate punitive damages than by genuine contrition:

> Evidence of the parties' conduct subsequent to the event, which produces plaintiff's claim for punitive [15049] damages, whether aggravating or mitigating, must be probative of the defendant's state of mind *at the time of the transaction*. [Citation omitted].
>
> . . .
>
> In the case here at issue the evidence of contrition and a conciliatory attitude of one of the defendant's agents after the complaint was filed has scant relevance respecting the state of mind of other agents of defendant at the time [of the wrong]. Assuming the evidence established the good faith and good will of defendant's president toward plaintiff, such conduct came as a response to the complaint, which prayed for substantial punitive damages. The evidence shows a desire to "buy peace" and minimize the risk of an award of punitive damages and not that the defendant dealt in good faith with plaintiff [at the time of the tort].

Byers v. Santiam Ford, Inc., 574 P.2d 1122, 1125 (Or. 1978) (emphasis added); *see also Moran v. Johns-Mansville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982) (applying Ohio law); *cf.* David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive Damages Award?*, 57 *Md. L. Rev.* 174, 216 (1998) (Fed. R. Evid. 407 "probably disallows the use of subsequent remedial measures to determine liability for punitive damages, and probably the amount as well.").

Other courts, however, permit the introduction of post-occurrence remediation evidence by the defendant as a shield against punitive damages. The Tennessee Supreme Court has held that jurors *must*, in assessing punitive damages, consider "whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused . . ." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 [15050] (Tenn. 1992); *but see* P. Steven Hacker, *Comment, Tennessee Attempts to Tighten the Purse Strings on Punitive Damages*: Hodges v. S.C. Toof & Co., 60 *Tenn. L. Rev.* 983, 995 (criticizing decision on grounds that "allowing such evidence to be admitted during a punitive damages stage may merely present the bad actor with the opportunity to mitigate punitive damages through use of a recently initiated subsequent remedial measure as window dressing."); *see also Spaeth v. Union Oil Co.*, 710 F.2d 1455 (10th Cir. 1983) (distinguished by court in *O'Gilvie*); *Lazenby v. Godwin*, 299 S.E.2d 288 (N.C. 1983) (reversing judgment on grounds that trial court improperly excluded evidence of remedial actions undertaken by defendant after allegedly fraudulent acts).

We decline to endorse here, in the context of an employment discrimination suit, either the view that such evidence is always relevant, or that it is always irrelevant. We note that nearly all the courts that have discussed this issue have done so in products liability suits, which present their own unique issues and problems. In most such suits, for example, the defendant attempts to exclude under Federal Rule of Evidence 407[6] any evidence of post-occur-

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[6] Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made

(continued...)

rence remediation, fearing that introduction of such evidence tends to show consciousness of guilt. In the employment discrimination context, however, post-occurrence remediation is part and parcel of the legal framework. Under the negligence standard, the plaintiff must prove that the employer failed to take reasonably prompt corrective action once it learns of the harassment. And, in the [15051] vicarious liability context, the *Ellerth/Faragher* defense encourages employers to introduce such evidence as a defense to liability. Thus while the case law cited above highlights the conflicting policy implications of admitting or excluding this category of evidence, it does not compel any particular answer here.

Accordingly, we hold that a district court may, in its discretion, allow a defendant/employer to introduce evidence of remedial conduct undertaken in response to its discovery of discrimination as a means to mitigate punitive damages. Likewise, where the plaintiff, in arguing for punitive damages, contends that they are necessary to "teach the defendant a lesson," post-charge remediation may be relevant to defendant's posture. The plaintiff can, of course, make arguments about prejudice, too little too late, and relevance of remedial conduct. Adoption of this approach has the advantage of encouraging employers to implement remedial measures, while leaving to the trial court, which has a front-row seat in evaluating the evidence, the discretion to

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[6] (...continued)
the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

determine the limitations on such evidence. In framing this discussion, we do not attempt to prejudge in all cases whether remedial conduct is admissible, even if it occurs after the plaintiff has filed a charge with an administrative agency such as the EEOC, or has in fact filed a lawsuit. Rather, the determination as to whether the evidence is too far afield, temporally or by subject matter, is left, in the first instance, to the discretion of the trial court.

While we stress that district courts have discretion, under traditional relevance principles, to admit or exclude evidence of remediation undertaken after the filing of a complaint, we do offer some guidance. *Ellerth*, *Faragher*, and *Kolstad* all clearly stand for the proposition that employers should be encouraged to institute anti-harassment measures, and must be given the opportunity to present evidence of such efforts. Thus an employer should be given the opportunity to present evidence that tends to prove that it undertook prompt [15052] and appropriate remedial measures, whether such measures occurred before or after the plaintiff happened to file his complaint.

Consider the situation where the plaintiff quits based on a constructive discharge, files a § 1981 suit (or an EEOC complaint) the next day, and then seeks to bar any evidence of post-complaint investigation and follow-up. If a court were to exclude all post-complaint remediation evidence, the employer might well be denied the *Ellerth/Faragher* defense and the opportunity to demonstrate good faith as an argument against punitive damages. In contrast, if the plaintiff files an EEOC complaint, then waits until the last possible day to a file a lawsuit, and only then does the employer take any remedial action, the circumstances may well be different. The point is that the timing and nature of remedial action are case-specific and will not always fit in a neat box. From a policy standpoint, the law should encourage employers to undertake remedial action without regard to their ultimate liability.

We also wish to emphasize that evidence of post-charge remediation would not automatically bar the imposition of punitive damages. A jury would, of course, be free to discount such evidence on the grounds that the remedial action undertaken by the employer is nothing but a sham concocted by defense attorneys as a strategy to avoid punitive damages. In the first instance, the trial court acts as a gatekeeper with respect to relevance. But once this evidence is admitted, the system relies on the jury to determine whether the remedial conduct is nothing more than window dressing. We have little doubt that some juries will cast a skeptical eye on such evidence of after-the-fact good works. But the jury might also find that such remedial actions were indeed bona fide efforts to repent and to prevent the reoccurrence of similar harassment in the future, thus lessening the need for additional deterrence in the form of punitive damages.[7] *See* Hacker, [15053] *supra* at 994 (evidence of remedial measures "allows the defendant to illustrate some deterrence has already occurred . . ."). We also stress that our holding here does nothing to alter the underlying rules regarding a district court's determination of relevancy under the rules of evidence. *See* Fed R. Evid. 401-03.

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[7] Assume, for example, that—contrary to the evidence presented at trial—Swinton filed suit the week after he quit, and that high-level managers at U.S. Mat and Potomac immediately undertook swift and decisive action to remedy the situation by firing or disciplining anyone who had uttered a racial slur, demoting anyone who had witnessed the harassment but had failed to do anything about it, instituting a better reporting system, and sending all employees and managers to anti-harassment training. Under such circumstances, we would think that Potomac would be entitled to present this evidence as tending to demonstrate that it was capable of mending its ways without being hit over the head with the club of a significant punitive damages award. But such circumstances were not present in this case.

Turning, then, to the instant case, we conclude that the district court did not abuse its discretion in limiting, in response to Swinton's motion in limine, evidence of remedial action undertaken after Swinton filed his lawsuit. In fact, it appears that, despite the court's ruling, Potomac was still able to introduce evidence of remedial action undertaken after the filing of the suit. Specifically, human resources manager Vickie Thompson testified about the steps she undertook to investigate Swinton's charges, including interviews she conducted after Swinton filed suit. As a consequence, the court's ruling had the effect of excluding only one piece of evidence: the fact that all U.S. Mat supervisors and managers underwent anti-harassment training in September 1997, approximately seven months after Swinton quit, five months after he filed his unemployment claim alleging racial harassment, and two months after he filed suit. The district court was within its discretion to exclude this single piece of evidence. Such evidence, if introduced, would have done little, if anything, to undermine the uncontroverted evidence that, even after everyone in management became fully cognizant of Swinton's [15054] allegations, no one—not Pat Stewart, none of those at U.S. Mat who had witnessed the harassment and had done nothing about it, and none of the workers who had actually hurled the epithet "nigger" at Swinton—was ever fired, demoted, or in any way disciplined.[8]

Potomac also argues that the exclusion of evidence of remedial action undertaken after the suit was filed was particularly prejudicial because Swinton's counsel stated in his closing argument, while discussing punitive damages, that U.S. Mat "did nothing . . . . They should have done

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[8] Fosdick himself quit soon after Swinton left, leaving Potomac little opportunity to discipline him. We can only speculate whether the company would have disciplined him had he not quit on his own.

something." Potomac asserts that it was unfair to allow Swinton to argue that U.S. Mat "did nothing" in response to the harassment, but to preclude Potomac from introducing evidence tending to rebut this charge. Potomac's argument is unavailing, for two reasons. First, Potomac never made a contemporaneous objection to this argument, thus subjecting the error alleged only to the highly deferential "plain or fundamental error" standard of review, where we will reverse only "where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148 (9th Cir. 2001). Even were we to assume that Swinton's counsel's argument unfairly prejudiced Potomac, the level of prejudice does not rise to the level of "plain or fundamental error . . . where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Id.* Second, a close reading of the argument to which Potomac now objects reveals that the allegation that Potomac "did nothing" is a reference to a failure to train workers not to engage in harassment before the events about which Swinton complained—not to any actions that Potomac may have taken, or failed to take, after the filing of the suit. Recognizing that statements by Swinton's counsel were argument, not evidence, we also [15055] note that Potomac did introduce evidence of its investigation and follow-up, thus belying the claim that it did nothing.

In sum, given the particular circumstances presented here, the district court did not abuse its discretion in excluding, on a limited basis, evidence of remedial actions undertaken after Swinton filed suit.

C. Constitutional limits on punitive damages

Lastly, we must consider de novo whether the punitive damages award of $1,000,000 was constitutionally excessive

under *BMW. Cooper Indus.*, 121 S. Ct. at 1683. In *BMW*, the Supreme Court held that an award of punitive damages violates constitutional due process requirements if "grossly excessive." *BMW*, 517 U.S. at 562. The Court announced three "guideposts" to assist courts in determining whether an award violates this standard: the "degree of reprehensibility" of the tortfeasor's actions; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damage award"; "and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 575. Although the district court did not conduct a *BMW* analysis, we need not remand because "the constitutional issue merits de novo review." *Cooper Industries*, 121 S.Ct. at 1683.

1. Reprehensibility

We first must assess the degree of reprehensibility of Potomac's conduct. In so doing, we are mindful of the fact that the conduct for which Potomac was found liable was not Fosdick's "nigger" jokes per se, but rather the action—or, rather, inaction—of the company's proxies in response to them. But, of course, the reaction to the jokes cannot be divorced from the jokes themselves; one can only judge the reaction of the company with reference to that to which it reacted (or failed to react). [15056]

Potomac asserts on appeal that, though "tasteless, objectively offensive joking" occurred in its workplace, it was, at the end of the day, nothing more than "joking," and did not justify such a large punitive damages award. We reject this benign characterization of the evidence presented at trial. Swinton made clear on the witness stand that he did not consider the language to which he was subject a joke. The only African-American employee of about 140 at the U.S. Mat plant, he was subject to daily abuse featuring the word "nigger," "perhaps the most offensive and inflammatory

racial slur in English, . . . a word expressive of racial hatred and bigotry." *Merriam-Webster's Collegiate Dictionary* 784 (10th ed. 1993). Potomac presented its "joke" theory of the case to the jury. Had they believed it, they would have found for Potomac, as mandated by the jury instructions that required Swinton to prove that "the plaintiff regarded the conduct as undesirable and offensive." As signaled by the jury's verdict on liability and damages, they believed that what went on at U.S. Mat was "undesirable and offensive,"—not a "joke"—and we do not hesitate before agreeing.

Nor do we agree with Potomac's contention that a large punitive damages award is unjustified because "this [is not] a case where the plaintiff complained and his complaints went unaddressed." As explained above, Potomac made Stewart its proxy by placing him in the position as recipient of Swinton's harassment complaints. For the purposes of liability and damages, what Stewart knew, Potomac knew, and what Stewart failed to do, Potomac failed to do as well. Despite witnessing the constant barrage of racial harassment directed at Swinton, Stewart (and thus Potomac) did absolutely nothing to stop it. Despite testimony that offensive racial language was ubiquitous at U.S. Mat, there is nothing to indicate that anyone in the company did anything to combat this problem until officially informed by a state agency that Swinton was charging racial harassment.

Without minimizing the effect of the ugly word and the racially-charged jokes that permeate this case, we do note, [15057] however, that the Supreme Court in *BMW* outlined what one court has termed a "hierarchy of reprehensibility," with acts and threats of violence at the top, "followed by acts taken in reckless disregard for others' health and safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence." *Florez v. Delbovo*,

939 F. Supp. 1341, 1348-49 (N.D. Ill. 1996) (citing *BMW*, 517 U.S. at 575-76). Without deciding where exactly on the "hierarchy of reprehensibility" the conduct in this case falls, it is undisputed that it did not involve either actual violence or the threat thereof. While we certainly have nothing good to say about Potomac's conduct, we recognize that it does not amount to the worst kind of tortious conduct a defendant can commit.

In sum, we have no trouble concluding that the highly offensive language directed at Swinton, coupled by the abject failure of Potomac to combat the harassment, constitutes highly reprehensible conduct justifying a significant punitive damages award.

2. Ratio

We next examine the ratio of the punitive damages award to the amount of compensatory damages: $1,000,000 to $35,600, which yields a ratio of 28:1. We admit to uncertainty as we undertake this analysis. Though we are instructed that punitive damages must bear a "reasonable relationship" to compensatory damages, *BMW*, 517 U.S. at 580, the Supreme Court has also repeatedly held, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *id.* at 582-83 (internal citations and quotation marks omitted). "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of [15058] noneconomic harm might have been difficult to determine." *Id.* at 582.

This is precisely the type of case posited by the Court in *BMW*—the low award of compensatory damages supports

a higher ratio of punitive damages because of "particularly egregious" acts and "noneconomic harm that might have been difficult to determine." *Id.* at 582. The back pay damages were necessarily low because Swinton was paid only $8.50 per hour. And the personal distress and indignity visited upon Swinton are difficult to calculate. Indeed, as the Tenth Circuit has noted, "where the injury is primarily personal, a greater ratio may be appropriate." *Deters*, 202 F.3d at 1273.

Recognizing that the defendant's wealth can also be a factor in assessing the ratio, Potomac conceded that "The award was [not] out-of-line with defendant's net worth." Potomac is a multi-million dollar company with net sales exceeding $90 million in recent years. The ratio of the award is not excessive in view of this financial picture.

We are left, then, with the Supreme Court's upper limit of a "breathtaking 500 to 1" ratio, *id.* at 583, which "raise[s] a suspicious judicial eyebrow," *TXO Production Corporation v. Alliance Resources Corporation*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting), along with the Court's acknowledgment that "[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified . . . .", *BMW*, 517 U.S. at 583. We find little comfort in trying to discern parameters from other cases because the circumstances vary so widely. Such an exercise simply results in a scatter graph that pushes the decision toward a mathematical bright-line, a path that we eschew in accord with the Supreme Court guidelines.

It also bears noting that the jury was warned not to go hog wild. Even in the face of repeated admonitions by *Swinton's* counsel that the jury "[should] not get carried away," that it [15059] would be "wrong" to award ten million dollars, and that they should "[b]e more moderate," the jury awarded significant punitive damages. The large award appears to have been calculated by the jury to effect the twin goals

of punitive damages: "punishing unlawful conduct and deterring its repetition." *Id.* at 568.

Finally, under *BMW* we are permitted to address the reasonable relationship between the punitive damages and "the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." *Id.* at 581 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 21 (1991)). But for Swinton's decision that he couldn't take it any longer and thus had to quit, nothing in the record suggests that U.S. Mat would have done anything to address a workplace replete with racial and ethnic slurs, not only about blacks, but also directed at other minorities and ethnic groups. The fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude.

In view of the factors articulated by the Court, we cannot say that the ratio is constitutionally excessive or jars our "constitutional sensibilities." *Haslip*, 499 U.S. at 18. Our conclusion is not inconsistent with results reached in other circuits. For example, in *Deters*, the plaintiff, a woman, was "daily" called a "F'ing B" and told "come here, you C," and subject to myriad other crude sexual comments. 202 F.3d at 1266-67. The jury awarded her $5,000 in compensatory and $1,000,000 in punitive damages; the district court reduced the punitive damages award to $295,000 based on the Title VII damages cap established by 42 U.S.C. § 1981a(b)(3), resulting in a ratio of 59:1, much greater than the ratio here. *Deters*, 202 F.3d at 1266. Notably, the Tenth Circuit, in upholding the high-ratio award, relied on *BMW*'s admonition that a relatively low award of compensatory damages may support a high ratio "if a particular egregious act has resulted in a small amount of economic damages." *Id.* at 1273; *see also EEOC* [15060] *v. W&O, Inc.*, 213 F.3d 600, 616 (11th Cir. 2000) (upholding punitive damages of twenty-six and sixteen times compensatory damages in

pregnancy discrimination case); *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (upholding punitive damages award nineteen times award of compensatory damages: "Given the low actual damages due to appellee's short period of employment and the difficulty in measuring actual damages in a case involving 'primarily personal' injury, we hold that this is a constitutionally acceptable ratio between punitive and compensatory damages." (citing *Deters*, 202 F.3d at 1273)); *Lambert v. Ackerly*, 180 F.3d 997 (upholding award to six plaintiffs of $4.1 million in punitive damages on back pay plus emotional distress damages of $75,000 per plaintiff; *not* discussing *BMW*).

3. Analogous civil penalties

The last of the *BMW* guideposts which we must consider is "the difference between this remedy [punitive damages] and the civil penalties authorized or imposed in comparable cases." 517 U.S. at 575. There are no "civil penalties" for the type of conduct for which Potomac was held liable in this case. In applying this guidepost, however, several courts have analogized to Title VII's $300,000 damages cap. *See, e.g., Kim v. Nash Finch Co.*, 123 F.3d 1046, 1068 (8th Cir. 1997); *Florez*, 939 F. Supp. at 1348 (stating that Title VII cap "gives at least some indication of Congress's judgment as to the approximate level of punitive damages" in § 1981 cases). We do not mean here to imply that the Title VII damages cap applies in § 1981 cases; it does not. *See, e.g., Kim*, 123 F.3d at 1067 ("The Title VII statutory cap does not apply to limit the recovery under 42 U.S.C. § 1981."). But the Supreme Court has nonetheless directed us to refer to such analogous sanctions in determining the constitutionality of a punitive damages award. *See BMW*, 517 U.S. at 583-585. This factor, unlike the reprehensibility and ratio guideposts, weighs in favor of a reduction. That said, however, we also hasten to add that Congress has not

seen fit to impose any recovery [15061] caps in cases under § 1981 (or § 1983), although it has had ample opportunity to do so since the 1991 amendments to Title VII.

In sum, after analyzing the punitive damages award here in light of the three *BMW* guideposts, we cannot say that the punitive damages award amounts to a constitutional due process violation.

CONCLUSION

We affirm the jury's verdict as to liability, as to the award of compensatory damages, and as to the amount of punitive damages.

AFFIRMED. [15062]

APPENDIX

Selected Jury Instructions

Instruction No. 3

Under the law, a corporation is a person. It can act only through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

Instruction No. 10

To establish his claim of racial harassment under federal or state law against the defendant the plaintiff has the burden of proving each of the following propositions:

1. That there was language or conduct of a racial nature, or that occurred because of the plaintiff's race; and

2. That this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive; and

3. That the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of plaintiff's employment;

4. That management knew, through complaints or other circumstances, of the harassing conduct or language by Fosdick or co-workers and the employer failed to take reasonably prompt, corrective action designed to end the harassment, OR

5. That management should have known of the harassment [by] Fosdick or co-workers, due to the pervasiveness of the conduct or language, or through other circumstances, and the [15063] employer failed to take reasonably prompt, corrective action designed to end the harassment.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff on the state and federal harassment claims.

Instruction No. 12

If you find that the defendant neither knew nor should have known of the racially harassing conduct, plaintiff may still prevail under federal law if he proves each of the following propositions:

1. That there was language or conduct of a racial nature, or that occurred because of the plaintiff's race; and

2. That this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive; and

3. That the conduct or language was so offensive or pervasive that it could reasonably be expected to alter the conditions of the plaintiff's employment; and

4. That John Fosdick was employed in a supervisory capacity and participated in the harassment.

The defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the employer exercised reasonable care to prevent and correct promptly any racially harassing behavior, and

2. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. [15064]

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof, your verdict should be for the defendant on this claim.

If you find that each of the things on which plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which your verdict should be for the defendant on this claim. [15065]

[Filed December 5, 2001]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY SWINTON,	)	No. 99-36147
	)	
Plaintiff-Appellee,	)	DC# CV-97-01399-JET
v.	)	
	)	ORDER
	)	
POTOMAC CORPORATION, dba Crescent Cardboard Company, dba Crescent/U.S. Mat,	)	
	)	
	)	
	)	
Defendant-Appellant.	)	

Before: McKEOWN, W. FLETCHER, and RAWLINSON, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

[Filed December 17, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY SWINTON,	)	No. 99-36147
	)	
Plaintiff-Appellee,	)	D.C. No. CV-97-01399-JET
v.	)	
	)	Western District
	)	of Washington
POTOMAC CORPORATION, dba	)	
Crescent Cardboard Company,	)	
dba Crescent/U.S. Mat,	)	ORDER
	)	
Defendant-Appellant.	)	

Before: McKEOWN, Circuit Judge.

Appellant's motion for stay of the issuance of the mandate pending disposition of a petition of certiorari is GRANTED. Fed. R. App. P. 41(d)(2). The issuance of the mandate shall be stayed to and including March 5, 2002. If during that time Appellant files a notice with the clerk of this court that it has filed a petition for certiorari in the United States Supreme Court, the stay shall continue until final disposition by the Supreme Court.

Supreme Court U.S.
FILED
MAR 21 2002
OFFICE OF THE CLERK

No. 01-1349

In The

Supreme Court of the United States

POTOMAC CORPORATION,

Petitioner,

v.

TROY SWINTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

The Plaintiff, Troy Swinton, brought suit against the Petitioner, the Potomac Corporation, d/b/a U.S. Mat, for racial harassment and constructive discharge from employment. He alleged a violation of 42 U.S.C. § 1981, a violation of the Washington Law Against Discrimination, RCW 49.60 *et seq.*, and a state common law claim of outrage. The claim of outrage was dismissed at summary judgment, and the remaining claims went to trial in the District Court of the Western District of Washington. The jury returned a verdict of $5,621 in back pay; $30,000 for emotional distress; and $1 million in punitive damages. The judgment was entered on August 19, 1999. The Defendant appealed on numerous grounds. The Ninth Circuit affirmed on all grounds. *See Swinton v. Potomac Corporation,* 270 F.3d 794 (9th Cir. 2001). Petitioner Appendix [hereinafter Pet. App.]

The Plaintiff, Troy Swinton, was employed in the Defendant's shipping department from August, 1996, until February, 1997. He was the only African American of approximately 140 employees. Pet. App. at 6. Mr. Swinton testified that the racial jokes and slurs started a couple of days after he started working there, and that sometimes this would happen a couple of times a day and several times a week. Record 116:16-21. Mr. Swinton heard the term "nigger" used more than 50 times while employed by the Defendant. Pet. App. at 7-8. He also heard the term "boy" and "gook." Record 123:3-7; 128:10-20. He heard these terms used by both supervisors and co-workers. *Id.* Plaintiff also heard numerous jokes and negative comments about Polish people, Jewish people and gay people. Record 128:23-129:2. Many of the so

called "jokes" (but not all) are reported in the Ninth Circuit's opinion. Pet. App. at 6-7.

Pat Stewart was Plaintiff's immediate supervisor. Pet. App. at 6. Stewart testified that he heard racial slurs and jokes and comments while working at U.S. Mat about once a week in Swinton's presence. Record 271:22-273:5; 270:23-271:2. Stewart admits that he [Stewart] told racial jokes approximately 2-3 times. Record 273:19-23. He also heard one of the two Production Superintendents make racial jokes 2-3 times. Record 273:6-18; Pet. App. at 6-7. "Stewart admitted that although he had an obligation under company policy to report the racial harassment, he never made any such report and never told Fosdick [a supervisor with no immediate authority over Swinton] or anybody else to stop making such jokes." Pet. App. at 7.

Contrary to the representation of the Petitioner, the use of racial jokes and slurs was not limited to Jon Fosdick. Petition at 3. Racial jokes and slurs were also made by numerous co-workers in Swinton's presence. Pet. App. at 7. The jokes and slurs were ubiquitous. *Id.* A co-worker corroborated that "there were jokes about a wide variety of ethnic groups, including whites, Asians, Polish people, gays, Jews and Hispanics. Another testified that the majority of the people at U.S. Mat had actually witnessed the use of racially offensive language, and a third employee testified that 'just about everybody' at U.S. Mat had heard Fosdick [a supervisor from a different department] use racial slurs and comments." Pet. App. at 7. According to one co-worker, "the majority of employees who were employed at U.S. Mat made racial jokes, comments or slurs." Record 314:20-316:23. Not only is there substantial evidence to support the existence of a racially

hostile work environment, the pervasiveness of the racially hostile work environment is not rebutted.

It is undisputed that Swinton did not complain about the racially hostile environment. He didn't complain to his immediate supervisor, Pat Stewart, because Stewart already knew – he witnessed the jokes and laughed along. He didn't complain to the President, the alternative person designated by the employer's policy, because he didn't know the identity of the President. Pet. App. at 9. Swinton's reactions to the racially derogatory comments included glaring and walking away, and remarking to a co-worker that the jokes were "f***ed up." Swinton didn't ask Fosdick to stop because he knew that Fosdick regularly carried a .22 caliber pistol in his back pocket. Pet. App. at 8.

Swinton was constructively discharged. He didn't quit his job immediately because his fianceé was pregnant, and Swinton was the sole support. Finally, he quit on February 28, 1997, because he was "fed up with all the name-calling . . . he just couldn't take it anymore." Pet. App. at 8.

On March 7, 1997, Plaintiff filed an application for unemployment benefits with the Washington Employment Security Department indicating that he had quit on February 28, 1997. On the application form, Plaintiff referred to "racial slander" and "racial jokes daily by numerous people," and stated, "[e]veryday, from one person or another, a racial joke or comment was thrown my way, and I was sick and tired of it." Swinton identified several of the specific jokes about which he and others later testified at trial. He noted that he "didn't feel comfortable going to management because they already knew

about the problem and did nothing about it." Pet. App. at 9-10.

The State of Washington notified U.S. Mat of Swinton's allegations of racial harassment on or about April 17, 1997.[1] After receiving the unemployment compensation papers, the Human Resource Manager, Vickie Thompson, started an investigation. Pet. App. at 10. The investigation that she did in reference to Swinton was the first investigation that she had ever done concerning harassment or discrimination matters. Record 210:21-211:1. As part of the investigation, the Human Resources Manager interviewed Stewart, the Plant Co-Managers, and the President. All denied that they had witnessed harassment. Pet. App. at 10. Although a co-worker, Maloney, was mentioned in the unemployment compensation application as a harasser, the HR Manager didn't speak to Maloney. Record 222:21-25. Despite the fact that the HR Manager knew how to contact him, no effort was made to interview Swinton. Record 219:25-220:10. Nothing more was done until Plaintiff filed a lawsuit.

After the lawsuit was filed in July, 1997, the HR Manager interviewed more of Swinton's co-workers. Pet. App. at 10. All co-workers acknowledged the existence of racial joking. Record 239:22-25; 234:18-20; 230:19-231:7. In all of her interviews concerning Swinton, Thompson didn't ask anyone for how long a period of time the racial jokes had been going on, how frequently the racial jokes

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[1] The Ninth Circuit opinion actually says April 17, 1999. Pet. App. at 10. As can be readily discerned from the context of the opinion, this is a misprint.

had been told, or the specifics of what racial jokes or slurs were being used. Record 242:11-243:1; 240:18-242:10; 235:16-237:4; 232:20-234:7. According to Thompson, "a racial joke is a racial joke. I didn't need to know what it was." Record 233:2-4. The specific comments or jokes were "not important." Record 236. Thompson admitted that no disciplinary action has been taken against anyone at U.S. Mat for making racial comments or jokes. Record 211:11-14.

"In September of 1997, in apparent response to Swinton's charges, U.S. Mat had all of its supervisors and managers undergo training for the identification and prevention of harassment. No one at U.S. Mat was disciplined for the use of, or toleration of, offensive racial language." Pet. App. at 10.

II. SUMMARY OF ARGUMENT

The questions presented by the Petitioner address the availability of a negligence claim for co-worker harassment under 42 U.S.C. § 1981 and the admissibility of post-occurrence remediation on the issue of punitive damages. In reference to the negligence claim, the Petitioner asserts that there exists a split in the circuits. This is plain error. In support of its assertion that there exists a split in the circuits, the Petitioner cites a case from the Eleventh Circuit Court of Appeals which was vacated and withdrawn approximately two months later. Petitioner also cites an *unpublished* opinion from the Fourth Circuit Court of Appeals which is consistent with the Ninth Circuit's ruling in this case. All circuits that have reviewed the question have ruled that negligence is the

proper standard of liability for co-worker harassment. These rulings are consistent with the rulings of this Court.

The admissibility of post-occurrence remediation is reviewed under an abuse of discretion standard. There was no abuse of discretion in this case. Neither question presented for review satisfies any of the considerations governing review on certiorari. *See* Supreme Court Rule 10.

III. ARGUMENT OF COUNSEL

A. There Is No Split In The Circuits On The Availability Of A Claim For Negligence For Co-Worker Harassment.

The Petitioner asserts that there exists a split in the circuits concerning the availability of a claim for negligence for co-worker harassment. This assertion is superficially without merit. All circuits that have addressed the issue either directly or indirectly acknowledge that an employee can establish liability for co-worker harassment where the employer knew or should have known of the harassment and failed to take prompt remedial action. This issue satisfies none of the considerations governing review on certiorari. *See* Supreme Court Rule 10.

1. *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998) Has Been Vacated And Withdrawn By The Eleventh Circuit.

The Petitioner cites *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998), for the proposition that a theory

of negligence cannot be applied to co-worker harassment "where the plaintiff alleged that management knew of the co-worker harassment but nevertheless failed to take reasonable steps to correct it." Petition at 7. Petitioner quotes at length from the opinion and refers to it repeatedly. Petitioner neglects to mention, however, that this opinion has been vacated and withdrawn. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999). None of the language relied upon by the Petitioner appears in the substituted opinion. In the substituted opinion, the Court omits any mention of vicarious liability, the theory of negligence or the Supreme Court's ruling in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). In the Conclusion of the opinion, the Court states: "When an employee's ability to perform his or her job is compromised by discriminatory acts including sexual harassment and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate." *Id.* at 1366. Clearly, the Eleventh Circuit corrected its prior misunderstanding of the applicable law.

2. *Ocheltree v. Scollon Productions, Inc.*, 161 F.3d 3 (4th Cir. 1998) Has No Precedential Value And Acknowledges A Theory Of Negligence For Co-Worker Harassment.

As stated by the Petitioner, *Ocheltree v. Scollon Productions, Inc.*, 161 F.3d 3 (4th Cir. 1998), is an unpublished opinion. Petition at 8. Unpublished opinions are not binding precedent in the Fourth Circuit Court of Appeals. *See* Fourth Circuit Local Rule 36(c).

Petitioner quotes from *Ocheltree* as follows: "the Supreme Court disregarded the actual or constructive knowledge element [of a negligence claim] and held that '[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.' " *See* Petition at 8. The Petitioner fails to mention, however, that at the conclusion of the quoted language the Court inserts a footnote. Footnote number 1 reads as follows: "The Supreme Court did not address the extent to which an employer may be vicariously liable for actionable conduct caused by a nonsupervisor (sic). Presumably, in those instances, a plaintiff must still show actual or constructive knowledge." *Id.* at fn 1. The language omitted by the Petitioner reveals that in its unpublished opinion the Fourth Circuit recognizes that the theory of negligence still applies to actionable conduct by a non-supervisor or supervisor without immediate or successively higher authority.

B. The Application Of A Negligence Theory For Co-Worker Harassment Is Not In Conflict With Any Supreme Court Decision.

The Supreme Court has ruled that the employer is vicariously liable for the harassment of a supervisor with immediate or successively higher authority. In the absence of tangible employment action, the Court created a two prong affirmative defense; that the "employer exercised reasonable care to prevent and correct promptly" harassing behavior *and* that the employee was "unreasonable" in failing to complain. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633

(1998) and *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2292-93. The affirmative defense is limited to cases seeking vicarious employer liability for conduct by a supervisor with immediate authority or above. In reference to co-worker harassment, a negligence theory continues to apply where management either knew or should have known of the harassment and failed to stop it.

> [A]n employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII, but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Ellerth, supra at 759. A finding that the employer knew or should have known of the harassment and failed to take prompt remedial action forecloses a finding of reasonable care to prevent or correct harassment as an affirmative defense. The two findings are entirely inconsistent.

The Petitioner argues that "employers can face higher exposure for co-worker harassment than for supervisor harassment. Employers should not have fewer defenses in co-worker cases, when the basis for their liability is more attenuated." Petition at 17. As explained by the Ninth Circuit, "this reasoning rests on the faulty premise that an employer is 'better off' in the strict liability context than the negligence context." Pet. App. at 14. Reasonable care is an essential element of both the employer's affirmative defense and the employee's claim

of negligence. As an affirmative defense, the employer has the burden of proving that it did exercise reasonable care. To establish negligence, the employee has the burden of proving that the employer failed to exercise reasonable care. In both instances, the lack of reasonable care is at issue. The only difference is the allocation of the burden of proof. "[T]he chief difference is that in the negligence context, the plaintiff bears the burden of proving the employer's failure to respond adequately to the harassment, while, in a vicarious liability regime, the defendant must establish the corrective action as an affirmative defense." Pet. App. at 14-15. Under either theory, liability turns on the question of negligence.

Pat Stewart, Plaintiff's immediate manager, was designated as the company official to receive allegations of harassment. He admitted that he tolerated the harassment; that he had an obligation to report all harassment; and that he failed to do so. This, as a matter of law, constitutes a lack of reasonable care. As explained by the Ninth Circuit, for the purposes of imputing knowledge to the employer an employee is a "manager" if "he 'has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.' " Pet. App. at 16. *See also Wilson v. Tulsa Junior College*, 164 F.3d 534, 541-42 (10th Cir. 1998) ("[A] procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take action falls short of that which might absolve an employer of liability"); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 118 (3rd Cir. 1999) ("liability established because 'a supervisor with the duty to stop harassment, was aware of much of

the harassment, even that which he did not himself inflict' "); *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998) ("when 'the employer's supervisory personnel manifest[ ] unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy' "). The Petitioner cites six additional cases supporting this theory of negligence. *See* Petition at 11.

Although the Ninth Circuit relied upon the actual knowledge of Plaintiff's immediate supervisor as a source of negligence, knowledge of the racially hostile environment was also constructive. The racial jokes and slurs were ubiquitous. The evidence established that Plaintiff was harassed by numerous co-workers and supervisors (managers). The majority of the employees told racial jokes on a daily basis. The pervasiveness of the racial harassment in this case is of such a magnitude that the failure to have actual knowledge can only be explained by negligence rising to the level of deliberate indifference. There is more than substantial evidence to support a finding that management knew or should have known and failed to take prompt remedial action. This is sufficient to establish liability under a theory of either vicarious liability or negligence because under either theory there existed a lack of reasonable care.

In addition to the above, the evidence clearly supports a finding that the Petitioner failed to exercise reasonable care in the investigation eventually conducted. The HR Manager acknowledges that she didn't inquire about the frequency or duration of the racial "joking," and didn't inquire about the specifics of which racial comments were said. *See Faragher*, 524 U.S. at 787-788,

118 S.Ct. at 2283 ("We directed courts to determine whether an environment is sufficiently abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance' ") (*citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). The HR Manager also failed to interview one of the harassers specifically mentioned in the unemployment compensation application, and made no effort to speak with Plaintiff. Despite the ubiquity of the racial slurs and jokes, no one employed by the Petitioner was disciplined in any way.

Quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Petitioner argues that "employers are not always automatically liable for sexual harassment by their supervisors." Petition at 12. But in this case, liability was not predicated on the harassment of supervisors with immediate authority over Plaintiff. It was predicated on the harassment by a supervisor (Fosdick) *without* immediate authority over Plaintiff, and by many co-workers. Nothing in the Ninth Circuit's decision establishes automatic liability. It merely reaffirms that where an employer has knowledge or should have knowledge of a racially hostile environment and fails to take remedial action, the employer is liable. This is exactly the standard articulated in *Burlington Industries, Inc. v. Ellerth, supra* at 759. In effect, the Petitioner is asking this Court to eliminate the necessity of reasonable care from the liability equation. This request is unsupported by any authority, contrary to existing law, and must be rejected.

C. The Admissibility Of Post-Occurrence Remediation On The Issue Of Punitive Damages Is Discretionary With The Trial Court. There Was No Abuse Of Discretion.

This Court has held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. *Old Chief v. United States*, 519 U.S. 172, 174 fn 1 (1997); *United States v. Abel*, 469 U.S. 45, 54 (1984). In order to reverse, an appellate court must find the trial court's ruling was manifestly erroneous. *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879) ("cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous"). The exclusion of post-occurrence remediation in this case was not manifestly erroneous.

The Petitioner argues that evidence of post-occurrence remediation is always admissible regardless of the circumstances. The Ninth Circuit analyzed this issue with great care. *See* Pet. App. at 29-39. The Court correctly ruled that the admissibility of such evidence is discretionary with the trial court, and that the exclusion of the evidence in this case was not an abuse of discretion. This issue satisfies none of the considerations governing review on certiorari. *See* Supreme Court Rule 10.

A long line of cases establishes that evidence of post-occurrence remediation is not admissible for the purpose of proving the lack of discrimination. *Lam v. University of Hawaii*, 40 F.3d 1551, 1567 fn 17 (9th Cir. 1994) ("Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from

liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer"); *Bouman v. Block*, 940 F.2d 1211, 1227 (9th Cir. 1991) ("We have recognized that '[l]ooking at the [employer's] record of performance after the courts have been asked to intervene is irrelevant to the merits of a discrimination claim and can be highly misleading' "). The reasoning of this line of cases is instructive. In *Gonzales v. Police Dept., City of San Jose, Cal.*, 901 F.2d 758 (9th Cir. 1990), the Court explained that " 'research leads us to conclude that often the acts relied upon as evidencing good faith are taken in response to the lawsuit filed by the discriminatee. Such actions in the face of litigation are equivocal in purpose, motive and permanence.' " *Id.* at 762.

Still other cases establish that such evidence is not admissible for the purpose of defeating a claim for injunctive relief. These Courts recognize that "protestations or repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated." *Davis v. County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1977); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (same); *James v. Stockham Values and Fittings*, 559 F.2d 310, 354-355 (5th Cir. 1977) (same); *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648, 658 (4th Cir. 1967) (same); *Thompson v. Boyle*, 499 F.Supp. 1147, 1168 (D.C. 1980) (same); *Spencer v. General Electric*, 703 F.Supp. 466, 470 fn 12 (E.D. Va. 1989) (same). Because the injunction line of cases, like cases involving punitive damages, concern deterring future

misconduct, their reasoning should have persuasive force. Evidence of post-occurrence remediation inadmissible to prevent injunctive relief should be inadmissible to prevent punitive damages.

After reviewing the case law and academic commentary, the Ninth Circuit discovered some cases that "have taken the view that such evidence [post-occurrence remediation] is almost never relevant in assessing punitive damages." Pet. App. at 32. The courts reasoned that such evidence "is more likely to be motivated by a desire to mitigate punitive damages than by genuine contrition." *Id.* at 33. But the Ninth Circuit was not convinced that a *per se* rule of exclusion was justified. Pet. App. at 29-30. The Ninth Circuit also discovered some cases that favored admissibility. But the Ninth Circuit rejected the Petitioner's suggestion that such evidence is always admissible: "We do not, however, read the cases as necessarily establishing the bright-line rule Potomac urges." *Id.* at 31. The Ninth Circuit declined to endorse, within the context of employment discrimination, either view "that such evidence is always relevant, or that it is always irrelevant." *Id.* at 34. Rather, admissibility is discretionary with the trial court. *Id.* at 35.

The Ninth Circuit offered thoughtful guidance on this issue. It recognized that employers should be encouraged to institute anti-harassment measures, and must be given the opportunity to present evidence of such efforts in the appropriate circumstances. "The point is that the timing and nature of remedial action are case-specific and will not always fit in a neat box." *Id.* at 36. Where an employer learns of harassment almost immediately

before suit is filed, the exclusion of post-occurrence remediation will eliminate the employer's ability to prove that it took prompt remedial action as a defense to liability. Where, on the other hand, an employer has had a substantial opportunity to take remedial action, but has failed to do so until after a lawsuit is filed, the remedial action has less probative force and the motives for the remedial action are more suspect. Pet. App. at 36.

As applied to this case, management had actual or constructive knowledge of the racial harassment from the very outset of Plaintiff's employment. Indeed, the fact that he was the only African American in a work force of approximately 140 employees should have alerted management to the real potential for harassment and the immediate necessity for training. Instead, they waited until more than five months after receiving formal notice of the harassment and two months after Plaintiff filed suit.

> [T]he fact that all U.S. Mat supervisors and managers underwent anti-harassment training in September 1997, approximately seven months after Swinton quit, five months after he filed his unemployment claim alleging racial harassment, and two months after he filed suit . . . such evidence, if introduced, would have done little, if anything, to undermine the uncontroverted evidence that, even after everyone in management became fully cognizant of Swinton's allegations, no one – not Pat Stewart, none of those at U.S. Mat who had witnessed the harassment and done nothing about it, and none of the workers who had actually hurled the epithet "nigger" at Swinton – was ever fired, demoted, or any way disciplined.

Id. at 38. Under these circumstances, the exclusion of this evidence was not an abuse of discretion.

IV. CONCLUSION

The Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted this 21st day of March, 2002.

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Supreme Court, U.S.
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(3)

No. 01-1349

In the Supreme Court of the United States

POTOMAC CORPORATION,

Petitioner,

v.

TROY SWINTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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I. RESPONDENT CONFIRMS THAT FACTS ESSENTIAL TO PETITION ARE UNDISPUTED

Despite its level of detail and numerous citations to the Record, Respondent's Statement of the Case confirms that the facts essential to this Petition are undisputed. Those essential facts are: a) that Respondent's supervisor knew of Respondent's racial harassment by co-workers but never reported or redressed that harassment (Opposition, p. 2), and b) that Respondent never complained to his supervisor or anyone in management about the harassment. (Opposition, p. 3).

II. RESPONDENT'S CONTENTION THAT THERE IS NO SPLIT AMONG THE CIRCUITS IS WRONG

Respondent, in his opposition brief, correctly states that the first opinion in *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998) was withdrawn. But respondent's contention that this erroneous citation means "there is no split in the Circuits on the availability of a claim for negligence for co-worker harassment," is absolutely wrong. (Opposition, p. 6).

A. The Subsequent Opinion In *Coates v. Sundor Brands, Inc.* Confirms Original Holding, And Applies The Analysis Relied Upon By Petitioner

In its subsequent opinion, published at 164 F.3d 1361, the Eleventh Circuit holds, as it did in its original opinion, that the defendant employer was entitled to

summary judgment.[1] As in its first opinion, the court looked to whether the employer had notice of the harassment by virtue of the victim's supervisor's observation of the harassment and whether the employee took reasonable steps to follow the reporting channels contained in the employer's handbook. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364 (11th Cir. 1999).

While not specifically labeling it as such, this is a *Faragher* and *Ellerth* analysis, where the two relevant inquires are: 1) whether the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and 2) whether the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 764-65; 118 S. Ct. 2257, 2270 (1998).

In short, both the structure and the substance of the Eleventh Circuit's subsequent opinion in *Coates* reveal that the court in fact *applied*—as it did in its original opinion—the *Faragher/Ellerth* vicarious liability and affirmative defense analysis. The only significant difference between the two opinions, then, is that the Eleventh Circuit cited no authority for the analysis it undertook in the second opinion.

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[1] There is no indication in the second *Coates* opinion as to the reason for withdrawing the original opinion in favor of the one published at 164 F.3d 1361. The same panel of three judges published both opinions.

B. The Subsequent Opinion In *Coates v. Sundor Brands, Inc.* Contains The Language And Analysis Relied Upon By Petitioner

Respondent argues that there is no circuit split evidenced by *Coates v. Sundor Brands, Inc.*, because "[n]one of the language relied upon by the Petitioner appears in the substituted opinion." (Opposition, p. 7). For the reasons stated in Section II(A), *supra,* this argument is belied by the holding and analysis applied in the substituted opinion. And with respect to the "language relied upon by the Petitioner," Respondent's statement is simply untrue. Judge Barkett, who authored the original opinion in *Coates,* authored a separate concurring opinion in the subsequent publication which contains most of the same language, and *all* of the same reasoning relied upon by Petitioner for the proposition that the *Faragher / Ellerth* affirmative defense must be applied in circumstances where plaintiff's supervisor fails to report or redress co-worker harassment. Specifically, Judge Barkett wrote, *inter alia,* as follows:

> In *Faragher* and *Burlington Industries,* the Court applied this "aided-by-the-agency-relation" standard to cases where the supervisors' own actions constituted the harassing conduct, and held in each case that employers are vicariously liable to victimized employees for such harassment. *See Faragher,* ___ U.S. at ___-___, 118 S. Ct. at 2292-93; *Burlington Industries,* ___ U.S. at ___, 118 S. Ct. at 2270. This standard applies *equally* to cases where the supervisor had adequate notice of a sexually hostile work environment and did nothing to remedy the problem, thus facilitating and prolonging the harassment. The whole point

> of *Faragher* and *Burlington Industries* is that an employer cannot escape liability under Title VII for workplace discrimination when the harm is traceable to the actions of a supervisor acting in the capacity of agent of the employer. And where a supervisor knows of the sexual harassment of an employee by a co-worker and does nothing to remedy the problem, this inaction is both discriminatory and aided by the agency relation.
>
> * * *
>
> A supervisor's failure to act when that supervisor has knowledge of the harassment and the authority to prevent it inflicts harm on the victim that is as real as if the supervisor were doing the harassing. The victimized employee in this situation thus suffers two distinct, discriminatory harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury. In addition, a supervisor's inaction in the face of adequate notice "is facilitated by the existence of the actual agency relationship" as surely as if the supervisor's action created it. *Faragher*, ___ U.S. at ___, 118 S. Ct. at 2290.

Coates v. Sundor Brands, Inc., 164 F.3d at 1368 (concurring opinion).

This concurring analysis addresses head-on the applicability of the *Faragher/Ellerth* vicarious liability and affirmative defense analysis to a case in which the plaintiff's supervisor allegedly failed to redress harassment by a co-worker, and it is in direct conflict with the analysis applied by the Ninth Circuit to the identical issue in this case. Both the concurring opinion and the majority's

analysis and holding in the substituted opinion therefore clearly evidence the Circuit split identified by Petitioner.

C. The Holding In *Ocheltree v. Scollon Productions, Inc.* Further Evidences The Split Among The Circuits

In a separate attempt to neutralize the split among the Circuits, Respondent argues, with respect to the Fourth Circuit's decision in *Ocheltree v. Scollon Productions, Inc.*, 161 F.3d 3, 1998 WL 482783 (4th Cir. 1998), that the Fourth Circuit "recognizes that the theory of negligence still applies to actionable conduct by a non-supervisor or supervisor without immediate or successively higher authority." (Opposition, p. 8). Specifically, Respondent points to Footnote 1 of the *Ocheltree* opinion, which states: "The Supreme Court did not address the extent to which an employer may be vicariously liable for actionable conduct caused by a non-supervisor. Presumably, in those instances, a plaintiff must still show actual or constructive knowledge." (Opposition, p. 8).

Once again, Respondent ignores the Fourth Circuit's holding in an attempt to misdirect the Court's attention. Indeed, Footnote 1 did not prevent the Fourth Circuit from applying the *Faragher/Ellerth* vicarious liability and affirmative defense analysis to the "non-supervisor" co-worker harassment case at hand, in which the plaintiff complained that her immediate supervisor knew of plaintiff's harassment by her co-workers (because plaintiff had reported it), but nevertheless failed to redress the situation. Based on these facts, the Fourth Circuit held that the proper method of analysis was vicarious liability under *Faragher* and *Ellerth* because one of the plaintiff's supervisors "was at least in part responsible for creating

the [hostile] work environment" by being unresponsive to plaintiff's complaints. *Ocheltree*, 1998 WL 482783 at *3.

In so holding, the Fourth Circuit—in direct contrast to what the Ninth Circuit did in this case—chose *not* to apply the negligence analysis to a case involving a supervisor's failure to report or redress co-worker harassment.

III. RESPONDENT CONFIRMS THAT IT IS THIS COURT'S DICTA IN *ELLERTH* THAT IS CAUSING CONFUSION OVER THE CONTINUED VIABILITY OF "NEGLIGENCE" THEORY OF LIABILITY

Respondent's reliance on dicta from *Ellerth* to justify the continued viability of "negligence" liability in cases where plaintiff's supervisor fails to report or redress harassment confirms that this Court must intervene to remedy the confusion, and to prevent the *Faragher/Ellerth* "accommodation" between principles of "vicarious liability" and Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees" from being ignored in practice. Specifically, Respondent states:

> The affirmative defense is limited to cases seeking vicarious employer liability for conduct by a supervisor with immediate authority or above. In reference to co-worker harassment, a negligence theory continues to apply where management either knew or should have known of the harassment and failed to stop it.
>
> > [A]n employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it

> knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII, but Ellerth seeks to invoke the more stringent standard of vicarious liability.
>
> *Ellerth, supra,* at 759. A finding that the employer knew or should have known of the harassment and failed to take prompt remedial action forecloses a finding of reasonable care to prevent or correct harassment as an affirmative defense. The two findings are entirely inconsistent.

(Opposition, p. 9).

As noted in Petitioner's original filing, there is a major analytical flaw in this analysis. When the Ninth Circuit held that "what Stewart knew, Potomac knew, and what Stewart failed to do, Potomac failed to do," it collapsed the management structure of Potomac down to one level and found that, as a matter of law, when a front line supervisor observes harassment, the employer has knowledge of the harassment. In such a circumstance, the employer's "negligence" equates to vicarious liability. But under the Ninth Circuit's analysis, the employer is not given the opportunity to demonstrate that it had an alternative reporting procedure in place and that the employee failed to follow it. So while the concept of "negligence" liability may remain viable in some circumstances, in *this case*, and in the dozens of other cases where liability will be premised on a supervisor's failure to report harassment, the "negligence" analysis breaks down.

IV. RESPONDENT'S "ABUSE OF DISCRETION" ANALYSIS IS IRRELEVANT TO PETITIONER'S ASSERTION THAT EVIDENCE OF POST-OCCURRENCE REMEDIATION EFFORTS MUST ALWAYS BE ADMISSIBLE

Petitioner asserts that this Court should grant *certiorari* to clarify that evidence of post-occurrence remediation efforts is always relevant and admissible. (Petition, p. 18). Respondent counters that the district court's exclusion of post-occurrence remediation in this case was not an "abuse of discretion," and that the Ninth Circuit's finding on this point was therefore correct. (Opposition, p. 13).

Respondent's argument misses the mark. Petitioner's contention is not that the district court abused its discretion; it is that the Ninth Circuit created a rule that leaves the admissibility of post-occurrence remediation evidence to the district court's discretion, contrary to this Court's stated objectives in *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 545, 119 S. Ct. 2118, 2129 (1999), *Faragher,* 524 U.S. at 807; 118 S. Ct. at 2292; and *Ellerth*, 524 U.S. at 764; 118 S. Ct. at 2270. (Petition, p. 18-19).

Indeed, this Court has relied upon post-occurrence remediation evidence as a means of mitigating a punitive damages claim. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), for example, this Court considered, in evaluating the reprehensibility of the conduct at issue, actions taken by the defendant (BMW) after the suit had been filed, as well as *after the judgment had been entered.*

> There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and dam-

> age requiring disclosure to purchasers. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions.

BMW, 517 U.S. at 571, n. 31; 116 S. Ct. at 1601, n. 31.

Similarly, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), this Court made note of actions taken by the defendant both in response to the litigation, and after a preliminary injunction had been entered, when analyzing the question of whether a district court's review of a punitive damages award should be subjected to a *de novo* review on appeal.

Given the importance to this Court of post-occurrence remediation evidence in the context of a punitive damages analysis, and given the fact (pointed out by the Ninth Circuit) that this Court has never "faced head-on" the question of "whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim," (Petition App., p. 31), this Court should grant *certiorari* to decide the issue.

Respectfully submitted,

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